(21,719.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 493.

GRENADA LUMBER COMPANY, C. T. STEPP, BAILEY & CRENSHAW, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 13, 1909.

1 STATE OF MISSISSIPPI:

Supreme Court, March Term, 1909, Monday, March 1st, 1909.

Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of Mississippi, Held at the Court-room, in the Capitol, in the City of Jackson, on the First Monday of March, 1909, in the Case of

No. 13301.

RETAIL LUMBER DEALERS ASSOCIATION
vs.
THE STATE OF MISSISSIPPI ex rel.

Caption of the Chancery Court.

Pleas and Proceedings Had and Done at a Regular Term of the Chancery Court of Hinds County, First District of said County and State, on the First Monday, Being the 6th Day of January, A. D. 1908.

Present: The Honorable G. Garland Lyell, Chancellor of the Fifth Chancery District of Mississippi, and Sole Presiding Judge of said Court, also present, W. W. Downing, Clerk of said Court, and R. J. Harding, Sheriff of Hinds County.

HON. G. G. LYELL, *Chancellor.*

2 Chancery Court, January Term, 1907.

STATE OF MISSISSIPPI,
Hinds County, First Judicial District:

STATE OF MISSISSIPPI ex rel. R. V. FLETCHER, Attorney General,
Complainant,
vs.
GRENADA LUMBER CO., et al., Defendant-.

To the Chancery Court of the First Judicial District of Hinds County:—

Complainant, the State of Mississippi upon the relation of R. V. Fletcher, Attorney General of the State of Mississippi would most respectfully represent and show unto the Court as follows:

That the (Grenada Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi is domiciled at Grenada in said State; that (C. T. Stepp) is a resident citizen of the State of Mississippi and resides at Cruger in said State; that (Bailey and Crenshaw) is a partnership located at Crenshaw Miss., and is composed of —— Bailey and —— Crenshaw, both of whom

reside at Crenshaw Miss.; (Nott & Ward) is a partnership located at Cleveland, Miss., and is composed of Nott —— and —— Ward, both of whom reside at Cleveland, Miss.; that Veazey, Clark & Co.,) is a partnership located at Coldwater, Miss., and is composed of —— Veazey, —— Clark & — all of whom reside at Coldwater, Miss.; that (P. T. Callicott) is a resident citizen of the State of Mississippi and resides at Coldwater, Miss.; that E. H. Dunlap Manufacturing Company) is a corporation organized and existing under the laws of the State of Mississippi and is Domiciled at Como, in said State;
3 that (I. M. Eagan) is a resident citizen of the State of Mississippi and resides at Crystal Springs in said State; (C. H. Parsons) is a resident citizen of the State of Mississippi and resides at Crystal Springs in said State; that (The Love Wagon Company) is a corporation orginized and existing under the laws of the State of Mississippi and is domiciled at Durant in said State; that (L. F. Grisham) is a resident citizen of the State of Mississippi and resides at Flora in said State; (Martin Brothers) is a partnership located at Flora, Miss., and is composed of —— Martin and —— Martin, both of whom reside at Flora, Miss.; that (E. W. Pickens) is a resident citizen of the State of Mississippi and resides at Goodman in said State; that (the Alexander Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Greenville in said State; that (the R. H. Barrett Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Greenwood in said State; that (the Woods Lumber & Manf. Co.,) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Greenwood in said State; that (the Finley Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Holly Springs in said State; that the Itta Bena Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi, and is domiciled at Itta Bena in said State; that (the Moorehead Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Moorhead in said State; that (the King Hardware Co.,) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at New Albany in said State; that (Hawkins & Hodges) is a partnership located at Okolona, Miss., and composed of —— Hawkins and —— Hodges both of whom reside at Okolona, Miss.; that (the Pickens Brick and Lumber Company) is a corporation orginized and existing under the laws of the State of Mississippi and is domiciled at
4 Pickens in said State; that (S. Bernheimer & Sons) is a partnership located at Port Gibson, Miss., and is composed of S. Bernheimer and —— & —— Bernheimer, all of whom reside at Port Gibson; that (Tucker & Gabbert) is a partnership located at Senatobia, Miss., and is composed of —— Tucker and —— Gabbert both of whom reside at Senatobia, Miss.; (Sumner Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Sumner in said State; that (the Shelby Lumber Company) is a corporation organized and

existing under the laws of the State of Mississippi and is domiciled at Shelby in said State; that (R. Jesty & Co.) is a partnership located at Winona, Mississippi, and is composed of R. Jesty and both of whom reside at Winona, Miss.; that (Edward Loggins) is a resident citizen of the State of Mississippi and resides at Winona in said State; that (Sessions & Roland) is a partnership located at Woodville, Miss., composed of —— Sessions and —— Roland both of whom reside at Woodville, Miss.; that (W. G. Harlow) is a resident citizen of the State of Mississippi and resides at Yazoo City in said State; that (Cohn Brothers) is a partnership located at Lorman, and is composed of —— Cohn and —— Cohn, both of whom reside at Lorman, Miss.; that (J. T. Scroggins) is a resident citizen of the State of Mississippi and resides at Inverness, Miss.; (Rosedale Lumber Co.,) is a corporation organized and existing under the laws of the State of Mississippi and is located at Rosedale in said State; that (John L. Ash) is a resident citizen of the State of Mississippi and resides at Centerville in said State; that (Oliver & Figg) is a partnership located at Courtland, Miss., and is composed of —— Oliver and —— Figg both of whom reside at Courtland, Miss.; that (Banks & Co.) is a partnership located at Hernando, Miss., and is composed of —— Banks —— and —— both of whom reside at Hernando, Miss.; that (Geo. P. Rye) is a resident citizen of the State of Mississippi and resides at Aberdeen of said State; that (Stiles-Tull Lumber Company) is a corporation
5 orgnaized and existing under the laws of the State of Mississippi and is domiciled at Canton in said State; that (King & Anderson) is a partnership located at Dickerson, Miss., and is composed of —— King and —— Anderson, both of whom reside at Dickerson, Miss.; that (J. M. Walker) is a resident citizen of the State of Mississippi and resides at Water Valley in said State; that (Shaw Hardware & Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is located at Shaw in said State; that (Silver City-Midnight Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is located at Yazoo City in said State; that (Holly Bluff Lumber Yard) is a corporation organized and existing under the laws of the State of Mississippi and is located a- Holly Bluff in said State; That (Cline-Holmes Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Hattiesburg, Miss.; that (the Charleston Lumber Co.) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Charleston in said State; that (the Mississippi Lumber Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Vicksburg in said State; that (the Barrett Grocery Company) is a corporation organized and existing under the laws of the State of Mississippi and is domiciled at Lexington in said State; that (W. L. Sanderson) is a resident citizen of the State of Mississippi and resides at Byhalia in said State; that (J. W. Bermingham &2Co.) is a partnership located at Greenville, Miss., and is composed of J. W. Bermingham and —— both of whom reside at Greenville, Miss.; that (E. M.

Stebbins & Company) is a partnership located at Abbeville, La., and is composed of E. M. Stebbins and —— both of whom reside at Abbeville, La.; that (Caddo-Rapides Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana, and is domiciled at Alexander in said State; that (Joseph W. Begnaud) is a resident citizen of the State of Louisiana and resides at Breaux Bridge in said State; that (Peoples Lumber Company) is a corporation organized and existing under the laws
6 of the State of Louisiana and is domiciled at Donaldsonville in said State; that (J. E. Kibbe) is a resident citizen of the State of Louisiana and resides at Erath in said State; that (Sidney L. Egnew) is a resident citizen of the State of Louisiana and resides at Hammond in said State; that (L. D. Spencer) is a resident citizen of the State of *Mississippi* (Louisiana) and resides at Hammond in said State; that (the Vorbenbaumen Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Lafayette in said State; that (A. E. Mouton) is a resident citizen of the State of Louisiana and resides at Lafayette in said State; that (the Bertha Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at New Roads in said State; (Allen Manufacturing Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Shreveport in said State; that (C. C. Hardman) is a resident citizen of the State of Louisiana and resides at Shreveport in said State; that (the Faught Lumber Company) is a corporation organized and existing under the laws of the State Louisiana and is domiciled at Welsh in said State; that (A. C. Skyles) is a resident citizen of the State of Louisiana and resides at Opelousas in said State; that Foster Creek Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Baton Rouge in said State; that (the Ozone Lumber and Building Supply Company) organized and existing under the laws of the State of Louisiana and is domiciled at Covington in said State; that (Leopold Elgutter) is a resident citizen of the State of Louisiana and resides at Newellton in said State; that (the Victoria Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Shreveport in said State; that (the Salmen Lumber Yard) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Napoleonville, in said State; that (Billeaud Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Broussard in said State;
7 that (the Central Manufacturing & Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at New Orleans in said State; that (the Rayville Lumber Company) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Rayville in said State; that (the Ascension Lumber Yard) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Donaldsonville, in said State; that

(the Caddo Lumber Company Limited) is a corporation organized and existing under the laws of the State of Louisiana and is domiciled at Shreveport in said State.

That all the above named persons, partnershaps and corporations are each and every one engaged in the business of selling at retail, lumber, sash, doors and blinds, and they each and every one maintain lumber yards and keep on hand stocks of lumber, sash, doors and blinds and other products and commodities manufactured from lumber for the purpose of selling to consumers at retail. That all of the said persons, firms and corporations are competitors in business, one with the other, and each with all the others, and each is engaged in selling and marketing the commodities above mentioned in competition with all and each of the others.

That on or about the 14th day of March, 1906 the said firms persons, partnerships and corporations, being then and there competitors in business as aforesaid entered into an agreement, contract and association known as the retail Lumber Dealers Association of Mississippi and Louisiana, for certain purposes and objects fully set forth in certain articles of agreement or statement known as the "Constitution" of the said Retail Lumber Dealers Association. This statement of the objects, purposes and plan of procedure of the said association will hereafter be designated in this Bill of Complaint as the "Constitution." A copy of the said "Constitution" so adopted is herewith appended, marked "Exhibit A" and is asked to be taken as a part of this Bill of Complaint. That all the persons, firms, partnerships and corporations named and set out in the first paragraph of this bill will hereafter be made parties defendant to
8 this action, and for convenience they will hereafter be designated as "Defendants".

That the said "Constitution" was duly adopted and ratified by all the defendants and that the said Constitution is fully obeyed and all its stipulations and agreements are fully carried out and complied with by all the defendants, and that pursuant to the provisions of the said Constitution, that said association has elected the officers and directors named in the constitution, and has maintained and does still maintain in office a salaried Secretary located at Yazoo City, Mississippi for the purpose of discharging the duties of such Secretary as set out in the said Constitution. That the said defendants hold semi annual meetings as provided for in the said constitution and in all respects regard and treat the provisions of the said constitution as binding and effective upon all the members of the said association, the said defendants. That the purpose and object of the said Association is to prevent and destroy all competition between the retail dealers in lumber and sash, doors blinds and other like commodities and wholesale dealers in the same and manufacturers thereof and to prevent such wholesale dealers and manufacturers from selling of said products direct to consumers in competition with the retail trade, and in order to accomplish this end, the said defendants as members of the said Association have agreed and confederated among themselves that they will not purchase any of their stock or commodities from any wholesale dealer or manufac-

turer who sells the said products or commodities direct to consumers in competition with the said retail dealers, defendants herein. That the said defendants, since the organization of the said Association and at the present time are all engaged in an effort to enforce Article Seven of the said Constitution and the said defendants are now fully carrying out and complying with all the provisions of the said Article Seven of the said Constitution.

That the said agreement contained in the said constitution has for its necessary effect the limiting and destruction of competi-
9 tion, since the said defendant- compose a vast majority of all the retail lumber dealers in the State of Mississippi and Louisiana and the said wholesale and manufacturers of lumber are under the necessity of refusing to sell direct to consumers upon penalty of losing all the business of the said defendants; that the effect of the said association and the agreement above set out has been to destroy, limit and reduce competition in the sale of lumber, sash, doors and blinds, the same being commodities. That the said defendants by reason of the said agreement have formed and are now operating a trust and combine; that the said association constitutes a combination, contract, understanding and agreement between two or more persons, corporations, firms and associations of persons in restraint of trade; to limit, increase or reduce the price of a commodity; to limit, increase or reduce the production of output of a commodity intended to hinder competition in the production, importation manufacture, transportation, sale or purchase of a commodity; to engross or forestall a commodity; to place the control to any extent, of business of the products and earnings thereof, in the power of trustees, by whatever name called, by which any other person than themselves, their proper officers, agents and employees shall, or shall have the power to, dictate or control the management of business; or to unite or pool interests in the impo-tation, manufacture, production transportation, or price of a commodity; and is inimical to the public welfare, unlawful and criminal conspiracy.

The officers directors of the said Retail Lumber Dealers Association are as follows:

President B. A. Tucker, who is a resident citizen of Senatobia, Mississippi; Secretary, B. A. Harlow, a resident citizen of Yazoo City, Mississippi; and Vice-President, E. E. Foster, a resident citizen of New Roads, Louisiana; O. B. Hopkins, who is a resident citizen of Lafayette, Louisiana; H. N. Alexander, who is a resident citizen of Greenville Mississippi; I. M. Eagan, who is a resident citizen of Crystal Springs, Mississippi; R. W. Bailey, who is a resident Citi-
zen of Crenshaw, Mississippi; R. H. Barrett, who is a resident
10 citizen of Greenwood Mississippi; R. T. Carr, who is a resident citizen of Shreveport, Louisiana; L. D. Spencer, who is a resident citizen of Hammond, Louisiana; O. A. Folse, who is a resident citizen of Donaldsonville, Louisiana.

The premises considered, Complainant therefore prays that all the persons, firms, partnerships and corporations named in the first part of this bill and all the above named officers, and directors of said Association be made parties defendants to this Bill of Complaint,

that all necessary and proper process do issue returnable to the next term of this court; that a temporary injunction issue upon the filing of this bill restraining and enjoining defendants from longer continuing as members of the said Association, restraining the said defendants from paying dues to said Association, making the reports to the Secretary thereof required by Article Seven of said Constitution, restraining the said officers and directors from performing any of the functions of their respective officers and enjoining defendants from carrying out any of the purposes and objects of the said Association; that all suitable and proper orders be entered and upon a final hearing of this cause that the temporary injunction be made perpetual and that a decree be entered declaring the said Association an unlawful trust and combine and dissolving the same and prohibiting defendants from — any wise enforcing or complying with the terms, agreements or stipulations of the said Constitution.

And if the relief herein specifically prayed for be inappropriate or insufficient then for such other further and general relief as to the court may seem right and proper.

And Complainant in duty bound will ever pray, etc.

11 (Copy.)

R. V. Fletcher,
Attorney General.

STATE OF MISSISSIPPI,
Hinds:

This day personally appeared before me Geo. C. Myers, Clerk of Supreme Court of the State of Mississippi, R. V. Fletcher, Attorney General of the State of Mississippi, who being by me first duly sworn on oath says that the allegations of the above and foregoing bill of complaint as made of his own knowledge are true as stated, and those made on information and belief he believed to be true.

R. B. FLETCHER.

Sworn to and subscribed before me this November 19th, 1907.

GEO. C. MYERS, *Clerk.*
C. H. MYERS, *D. C.*

To- Chancery Court of Hinds County will issue the injunction in conformity with the prayer of the bill upon filing of the bill.

Witness my hand this 19th day of November, 1907.

ROBT. B. MAYES,
Judge of Supreme Court.

12 EXHIBIT "A."

Constitution

of the

Retai' Lumber Dealers

Association

of

Mississippi

and

Louisiana

(Adopted March 14th, 1906.)

13 CONSTITUTION.

Declaration of Purpose.

We realize the convenience, and the necessity, of the retail lumber dealer to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business.

We recoginize the absolute right of every person, partnership and corporation to establish and maintain as many retail yards as they may wish, when*e*ever and wheresoever.

We recognize the right of the manufacturer and wholesale dealer in lumber products to seel lumber in whatever market, to whatever purchaser, and at whatever price, they may *a*ee fit.

We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition, where any exists.

And, recognizing that, we, as retail dealers in lumber, sash doors and blinds, cannot meet competition from those from whom we buy, we are pledged as members of this association to buy only from manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stock com-ensurate with the demands of their communities, and we are pledged not to buy from lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants agent or broker.

And, we appreciate the educational advantage to us derived through association and exchange of ideas in matters concerning our business, such as "Stock Keeping," "Grades," "Sizes," "Differ-

ent Kinds of Building Mater-al," "Advertising," "Bookkeeping," "Delivery," "Account and Statement Rendering," etc.

We appreciate the necessity of Good Credit and honest business dealings, and we discountenance any method contrary to these, and will not permit those guility to remain members of this Association.

14 We realize the fact that the retail lumber dealer often is compelled to have business dealings with those of whom he knows nothing, and that some system of corporation in the way of advising each other against buyers who are disposed to neglect their obligations, refuse to pay, complain without cause, etc., should be in effect, and recognizing and appreciating the advantage of co-poration in securing and disseminating any and all proper information for our mutual convenience, benefit and protection, we have organized this Association, and do hereby adopt the following articles for the government of our affairs:

Articles of Association.

ARTICLE ONE.

Name and Territory Covered.

The name of this organization shall be the Retail Lumber Dealers Association of Mississippi and Louisiana, and the territory embraced by it shall be the State- of Mississippi and Louisiana.

ARTICLE TWO.

The Object.

"The object of this Association is and shall be to secure, and disseminate among its members any and all legal and proper information which may be of interest or value to any member, or members thereof, in his or their business as retail lumber dealers and to carry into actual effect our "Declaration of Purpose"."

ARTICLE THREE.

Limitation and Restriction.

SECTION 1. No Rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

SECTION 2. No coercive measures of any kind shall be practiced or adopted toward any retailer, either to induce him to join the Association, or to buy or refrain from buying of any particular manufacturer of wholesaler. Nor shall any discriminatory prac-

15 tices on the part of this Association be used or allowed against any retailer for the re-son that he may not be a member of

the Association, or to induce or pursuade him to become such member.

SECTION 3. No premises or agreements shall be requisite — membership in this Association, save those provided in these "Articles of Association and Declaration of Purpose," nor shall any members be restricted to any particular territory, but may compete any and everywhere.

ARTICLE FOUR.

Membership.

SECTION 1. Any person, firm or corporation within the territory of this Association, regularly engaged in the retail lumber trade, carrying any assorted stock of lumber and building material reasonably commensurate with the demands of his community, shall be considered a retail lumber dealer, and be eligible to membership in this Association.

SECTION 2. Eligibility to membership in this Association shall be finally determined by the Board of Directors.

SECTION 3. Each Member, entering one yard, shall pay a membership fee of $10.00, which shall cover all dues to the end of the term in which he joins, and shall thereafter pay on March 1st $10.00 and September 1st $10.00 as dues.

SECTION 4. The initiation fee as provided in the proceeding Section, when paid shall entitle the party to membership, and to all the rights and privileges of this Association to the end of the term for which such dues are paid, and no longer; but membership may be renewed for such successive term by the prepayment of the dues for any such term, unless the Board of Directors shall, for cause, determine that the party is undesirable or ineligible to membership.

SECTION 5. Any member may withdraw from membership in this Association at any time by giving written notice to the Secretary of such withdrawel, and by surrendering his certificate of membership. Any member going out of the retail lumber business or transferring his business outside of the territory embraced by this Association shall be deemed to have withdrawn member-
16 ship.

SECTION 6. Any member withdrawing from membership, or ceasing to be a member for any reason, shall not be entitles to refund of init-ation fee, or of any annual dues, or of any part thereof, but the same, and the whole thereof, shall belong to the Association absolutely.

ARTICLE FIVE.

Officers.

SECTION 1. The affairs of this Association shall be managed by a Board of Eleven Directors (11), of which the President, Vice President, Treasurer and Secretary shall be members; and the Officers of Secretary and Treasurer may be held by one member.

SECTION 2. The President, Vice President and Board of Directors shall all be elected annually.

All officers except the Secretary and Treasurer who shall be elected annually by the Board of Directors, shall be chosen by the members of the Association by ballot. Each membership shall have one vote, and a majority of all the votes shall be necessary to a choice.

ARTICLE SIX.

Duties of Officers.

SECTION 1. Presiding Officer: It shall be the duty of the President to preside at all meetings of this Association, and its Board of Directors. In the absence of the President and Vice President, The Directors, in the order of their seniority, shall preside.

SECTION 2. Vice President: In the absence of the President the Vice President shall perform the duties of the President.

SECTION 3. Directors: It shall be the duty of the Board of Directors, after such annual meeting, to elect a Secretary to serve for one year, or for such term as the Board of Directors shall fix and require, not exceeding one year. They may fix his salary, but such salary shall not be in excess of the sum which said Board may reasonably expect to receive from the membership of the organization.

It shall be the duty of the Board of Directors, after such
17 annual meeting, to elect a Treasurer to serve one year, or for such term as the Board shall fix and require, not exceeding one year.

The Directors may examine the book of the Secretary as often as they may deem necessary, and if they shall find anything not satisfactory to themselves they shall have power to remove the Secretary.

The President shall immediately preceeding the annual meeting appoint a committee of two from the membership to examine the accounts of the Secretary and Treasurer and report at said meeting.

At the first meeting of the Directors after the annual election, the Directors shall elect an Executive Committee of three persons from their own number.

Should a vacancy occur in any of the officers of this Association, the Board of Directors shall at once appoint a cuccessor to serve until the next annual meeting.

The Board of Directors, or the Executive Committee thereof, may make such bylaws, not inconsistent with the provisions of the foregoing Declaration of Purpose and these Articles, as to them may seem necessary and practicable for the proper management and conduct of the affairs of this Association.

SECTION 4. Executive Committee: The Executive Committee shall at all times be subject to the control of the Board. They shall have charge of the affairs of this organization between meetings of the Board of Directors.

They shall also perform such other duties as the Board of Directors may require.

The Executive Committee shall meet at the office of the Secretary at such times as they may deem advisable, and also upon call of the Secretary, under the approval of the President.

All acts and things herein provided for, to be done or performed by, or under the direction of the Board of Directors, may be so done or performed by, or under the direction of the Executive Committee of said Board of Directors between the meetings of such Board.

SECTION 5. Treasurer: It shall be the Duty of the Treas-
18 urer to keep safely all moneys of the organization turned over to him by the Secretary, or received by him from any other source, and pay out the same, on consecutively numbered vouchers, approved by the President and attested by the Secretary. He shall give bond in the sum of $1000.00 to be approved by the President, the premium on same, if any, to be paid by this Organization.

SECTION 6. Secretary: It shall be the duty of the Secretary to keep the minutes of the meetings of this organization, and to keep a strict account of all moneys belonging to it, pay the same to the Treasurer, taking a receipt thereof. He shall, as agent for the Association, carry into effect so far as he can all rules and regulations of this Association. He shall make a report at each annual and semi-annual meeting of the work of the pervious term.

The Secretary shall notify each member of the regular and special meetings at least five days previous of such meetings.

The Board of Directors shall prescribe and determine what other service he shall give to the organization during the term of his office.

ARTICLE SEVEN.

SECTION 1. Report of Secretary: Any member of this Association having cause of complaint against a manufacturer or wholesaler dealer, or his agents because of shipment to a comsumer, shall notify the Secretary of this Association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor, and consignee, the purpose for which the material was or is to be used, and such other particulars as may be obtainable.

Such notice must be sent with or without information in detail, within thirty days after the receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring within fifteen days after the first issue of membership list succeeding the acceptance of his application.

Upon the receipt of such notice, the secretary shall first ascertain whether or not the complaining memner carries a stock com-
mensurate with the demands of his community, and, if he
19 finds that such stock is not carried, he shall ignore the complaint unless upon application of such complaining member, the Executive Committee shall reverse his finding, but if he find that such stock is carried, he shall then notify the manufacturer or wholesaler that the rules of this association do not allow its members to buy from those manufacturers and wholesalers who sell to

consumers, and unless such manufacturer or wholesaler shall sati-fy the Secretary that the complaint is not well founded the Secretary — report the facts to the Executive Committee, and upon the approval of his finding by a majority of the Executive Committee, the Secretary shall then notify the members of this Association of such sale, and they shall discontinue to buy from such manufacturer or wholesaler until notified by the Secretary that such wholesaler or manufacturer does not sell to consumers where there is a retail dealer who carries a stock commensurate with the demands of his community, but this section shall not apply in cases where the business methods or financial condition of such retailer will not justify a manufacturer or wholesaler in dealing with him.

Under no circumstances shall the Secretary enter into any agreement with a manufacturer or wholesaler that any one of the Association members will deal with him, nor shall he in any case exact a promise from the wholesaler or manufacturer that he will not sell to consumers, nor shall any result other than that of the members refusing to buy from any such manufacturer or wholesaler, follow from the steps taken as hereby provided for.

SECTION 2. The foregoing provisions, shall apply in reported cases of lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stock, and as against the manufacturers who sell to such commission merchants, agents or brokers.

SECTION 3. Each member, when he joins this association, and once each year thereafter, and oftener if the Secretary shall request it, shall furnish the Secretary a list of those manufacturers and wholesalers and their agents, from whom he makes purchases of lumber and other building material."

20 ARTICLE EIGHT.

Meetings.

SECTION 1. Annual. The annual meetings of this association shall be held in Jackson, Miss., on the Second Monday in March

SECTION 2. Semi-Annual meeting shall be held in Louisiana the Third Tuesday in September, at such place as may be named by a vote of the Association at the preceeding annual meeting.

SECTION 3. Special. Special Meetings of this Association may be called by the President when in his opinion such meetings are necessary.

SECTION 4. Notice. Members shall be notified by mail of annual and special meetings at least five days previous to such meetings.

ARTICLE NINE.

Quorum.

A quorum of this organization for the transaction of business shall be fifteen; a quorum of its board of Directors shall be six, and of its Executive Committee, two.

ARTICLE TEN.

Amendments.

Amendments to these articles may be made at any regular meeting, or special meeting, when the amendment to be offered is stated in the call for the special meeting, by a vote of at least two-thirds of the members present and voting.

STATE OF MISSISSIPPI,
Hinds County, First Judicial District.

Chancery Court, January Term, 1908.

STATE OF MISSISSIPPI
vs.
GRENADA LUMBER CO. et al.

Waiver of Process.

The undersigned attorneys, representing all the defendants in the above styled cause, hereby waive the issuance and service of writs of injunction, and also the issuance and service of summons in this case, acknowledge service of both the writ of in junction and the summons, and enter an appearance in this cause for all tye defendants.

21 This November 30th, 1907.

E. L. BROWN,
Solicitor for Defendants.

In the Chancery Court of Hinds County, Mississippi, First District.

To January Term, 1908.

THE STATE OF MISSISSIPPI
vs.
GRENADA LUMBER COMPANY et als.

The Joint and Several Answer of the Defendants.

Now come the defendants in the above styled cause, and not waiving the many errors and insufficiencies of the bill of complaint exhibited against them, but reserving unto themselves the benefit of all manner of exception therefor, for answer to so much and such parts of said bill of complaint as they are advised it is material for them to make answer to, jointly and severally answering, say:

I.

That the defendants admit that all the persons, copartnerships, and corporations named as defendants to said bill of complaint are each and every one engaged in the business of selling sash, doors,

blinds, lumber and lumber products at retail; that they maintain yards, and keep on hand stocks of said lumber products and commodities, for the purpose of selling the same at retail; that said defendants are competitiors in business, one with the other, and each with all the others, and that each is engaged in selling and marketing said commodities in competition with all and each of the others; and they aver and show that each of the said defendants has in the prosecution of such business legitimate and necessary interests to be conserved and advanced; and that, therefore, there is justification for their association in and by this bill complained of, because such association was formed for the purpose and with the intent
22 only to observe and advance such legitimate interest, and not for or with any purpose or intent to hinder or to injure.

II.

Defendants admit that, on or about the 14th. day of March 1906 they, being then and there competitors in business as aforesaid, entered into a contract, agreement and association, known as the Rretail Lumber Dealers Association of Mississippi and Louisiana for the certain purpose and objects set forth in their articles of agreement, of "Constitution," as alleged by said bill of complaint; and they admit that the copy of said constitution exhibited with said bill of complaint, is a true copy of said articles of agreement and constitution; and they admit that said association, under the terms of said articles of agreement, now exists, and that these defendants are consistently and continuously, and have been, since the day of March aforesaid, in all respects regarding and treating the said agreement as binding and effective upon them.

III.

Defendants now deny that such their agreement and constitution is, in any wise obnoxious to, or that their action in adopting, upholding, and carrying the same does in any wise violate the laws of the State of Mississippi, and especially the chapter of the Code of 1906 on the subject of "Trusts and Combines," or any of its provisions; and they deny that such constitution, or their action thereunder, constitutes either an unlawful combination in restraint of trade, or an unlawful monopoly, or an attempt at either.

Defendants now state and show that they had a lawful right to conserve and advance their business interests as retailers by the adoption of said constitution and by their course of action under the same; and they also deny that either their said constitution, or such their action, is inimical to the public welfare within the intent and meaning of said Code chapter, and, on the contrary, defendants state and show, that both their said constitution and their said action, when considered from the broad view of sound
23 trade principal, and of true trade economics, are calculated to advance and serve the public welfare, as well as the business interests of defendants. The time has passed when the crude and unsatisfactory method, obtained, that the producers shall find the consumers, and supply them directly. The improved and highly

devoleped methods of modern commerce and of modern manufacturers demand imperatively that the production and supply of great commodities shall be effected by division and specialization of both labor and capital. Those modern methods of manufacturers and of commerce are scientific in character, and not merely fortuitous and accidental; they have been formed by, and themselves are the result of, sharp and sustained competitions in their respective fields of industry, intelligently directed and persistently sustained. The common experience has shown that they are best calculated to meet the public needs, and to supply all desirable and largely used commodities, in the best form, in the most abundant supply, with the best opportunity for selection to meet special wants, and at the most reasonable prices. To a great extent, those results have been accomplished by the evolution and the continuance of those classes of industries designated in this bill, and in this answer, as the wholesale dealer and the retail dealers; each of which class of dealers has its own well recognized and commonly known function to perform in the processes of collecting and distributing commodities in trade; and each of which contributes to serve the public needs and minister to the public welfare. Each of them is, as a class, the product of the need for the subdivision of labor and of capital in the production of goods, and the supply of them to the consumer.

Defendants admit that competition in trade conduces to the public welfare, and that the public have a right to demand it; but defendants also show and claim that those engaged in trade have themselves a right to a reasonable return for their time and labor and capital invested therein, and have a right that their legitimate and useful business shall not be oppressed and perhaps destroyed
24 by an unfair, unreasonable and factitious competition; and neither does, nor can it, conduce to the public welfare that defendants' business shall be so oppressed and perhaps destroyed.

Defendants now show and state that, in the prosecution of their legitimate and useful business of retail dealers in lumber and lumber products, they carry stocks commensurate with the demands of the communities in which they are respectfully located: that they have invested in their business, and keep invested therein, large amounts of capital, the same being invested both in stock and in yards and buildings for the storage of stocks, and in other appliances for their trade, and they have to meet, and do meet, many heavy expenses incidental thereto; that they have invested in such business their credit and personal responsibility, their personal time and the time of their employés, their personal labor & services, their personal knowledge, skill and information, their thoughts and anxieties.

Defendants show and state further that their business is that of retail dealers; they are not producers, nor wholesale dealers, nor jobbers, nor factors; but, working and risking within the legitimate and useful field of their established industry, they buy and have to buy their stocks from wholesale dealers and manufacturers. Defendants aver and show that it is not just and fair that they shall be oppressed and their business injured by competition from those very wholesale dealers from whom they have bought their stocks in

trade, and from whom, in the nature of the trade, they have been compelled to buy the same. Those wholesale dealers carry their stocks in connection with their legitimate and proper wholesale business, they make no special provision for the retail trade, have nothing invested in either of capital, time, labor, or responsibility, and no expense account against such dealings; neither are they so prepared and situated as to furnish to consumers their necessary needs promptly, or with advantage to themselves or to the consumers, and in fact cannot afford to sell to consumers except in large quantities. So that the retailers would be left only that portion of the trade which consists of small orders, not sufficient to sustain them in business. When such wholesale dealers undertake to intercept the fair and proper business of retail dealers by selling direct to consumers in territory ad-quately supplied by retail establishments, it is not such a fair and just competition between man and man as the public welfare demands and the law exacts, but it is an unfair and unjust competition, offered on ungenerous and unequal terms, whereby an assault is made on the whole system of retail dealers.

In fact, Defendants aver and state, the matter actually in dispute in this litigation involves the practicability of establishing and maintaining retail trade in lumber and lumber products as a system; for, if retail dealers are by statute denied the right to protect their trade as a system by agreements and constitutions similar to the one in question, so free as it is from all coercive features and from all features deemed unlawful at the common law, and if they be required to submit to the unfair and unequal raiding of their business shown above, then the retail trade as a system is worth little or nothing to the retailers, and cannot be efficiently maintained. The true welfare of the public demands its reasonable protection and preservation, it meets a public need which wholesale and manufacturing establishments cannot so well supply, and, if it be true that trade is, or may be in any wise restrained, or competition restricted, by the agreement in and by this bill complained of, which defendants do not admit, such restraint and restriction are but reasonable and just, and are conducive, rather than inimical, to the public welfare.

IV.

The defendants now show unto the court that, in the State of Mississippi and Louisiana, there are approximately 2400 wholesale dealers in, and manufacturers of, lumber and lumber products, as defendants are informed and believe; that amongst these wholesale dealers and manufacturers there are many more than enough to supply these defendants with lumber and lumber products) who, for perfectly good business reasons of their own, and independently of any action on the part of said association, will not, and never would, sell the lumber or the products aforesaid to consumers, and who, as a settled business policy; independently of any action on the part of said association, and for perfectly good business reasons of their own, confine, and confined, their sales of said products to dealers. Defendants aver and show that

such their action in confining their sales to dealers is based on sound trade principles, and is not inimical to the public welfare, but is rather conducive to the same as shown above; and respondents have a right to agree amongst themselves, and to make such agreement known, that they will not purchase from any other class of dealers.

Defendants state and show that their said constitution does not have any aspect towards, nor is there between defendants any agreement or undertaking about, the retailing of lumber or lumber products by wholesale dealers or manufacturers in those communities where their establishments for wholesale of manufacturing purposes respectively are located; nor to the location and maintenance by wholesale dealers or manufacturers of retail establishments in any community in which such wholesale dealers or manufactures may desire to locate them

Defendants now show further that some wholesale dealers and manufacturers in Mississippi and Louisiana do have retail yards, and quit- all of the manufacturers maintain retail yards at their mills; and that the defendants do not refuse to buy of such wholesale dealers or manufacturers because of their maintaining retail yards, or selling to consumers at their mills; that the agreement of the defendants amongst themselves to buy only from such wholesalers and manufacturers of lumber and lumber products, as do not sell in the manner objected to by defendants, is only a requirement, by the defendants, of such wholesalers and manufacturers, that they shall but observe and follow, as a condition to obtaining the custom of defendants, a legitimate and useful method of trade, which generally has been long observed among wholesale dealers and manufacturers in this country in almost every branch of commerce and manufacturers, and that it was not the intent and purpose of
27 the legislature of the State of Mississippi, in the enactment of the laws commonly known as the anti-trust statutes, and under which this bill of complaint is framed, to make it unlawful for its citizens to resort to selfprotective agreements about the placing of their own trade, so long countenanced and upheld by the laws of the land, for the purpose of establishing and continuing their business, enhancing their trade, and making their occupations reasonably gainful.

That the defendants, therefore, deny that the purpose and object of said association was, or is, to prevent and destroy competition between retail dealers in lumber and its products, on the one hand, and wholesale dealers in, and manufacturers of, lumber and its products, on the other; and aver the truth to be that the purpose and object of said association are to promote and foster the trade and enhance the business and legitimate interests of the members, by purchasing from only those wholesale dealers in, and manufacturers of, lumber and its products, whose business policies are more favorable to the business of said members; and the defendants further deny that the said agreement between themselves has the necessary effect of limiting and destroying competition, and they deny that any wholesale dealer, in or manufacturer of, lumber and its products, is placed under any necessity by said agreement of refusing to sell direct to consumers thereof, and aver that, if the action

contemplated by said agreement should or does cause any wholesale dealer or manufacturer to refrain from selling direct to consumers, it would only be because he, of his own free choice would rather have the trade of the defendants than that of such consumers; and that if it be true that competition is lessened or hindered by said agreement, the defendants show that such result is only incidentally, and not directly, the result thereof, and that all wholesale dealers and manufacturers are at perfect liberty to choose the trade of consumers rather than that of the defendants, if they prefer it.

Defendants now show and state that, in the State of Mississippi and Louisiana, there are approximately 257 retail dealers
28 in lumber and lumber products, while the members of the defendant association number only seventy-seven, as is shown by the bill. Defendants constitute only a comparatively small minority of the retail dealers in such territory, and for that reason their agreement and constitution does not, and cannot, have the effect to prevent competition in lumber and its products, or to monopolize the trade therein.

The defendants now show that their constitution and agreement are not intended to, and do not, prevent or forbid competition amongst themselves, either expressly or impliedly, directly or indirectly; nor are they intended to, nor do they, prevent, or forbid, competition between defendants, or any of them on the one hand, and any other retail dealers, or any wholesale dealers or manufacturers who retail only to the communities where their own yards or mills are located, or any wholesale dealers or manufacturers who shall establish retail yards or establishments in those communities to which they sell by retail, or any wholesale dealers or manufacturers who retail in and to communities only where there are no local retail dealers who carry stocks commensurate with the local demand, on the other.

These defendants have not, and would not, under any circumstances, enter into any agreement with any one, or all of the manufacturers and wholesale dealers aforesaid, whereby they, or any of them, would be in any wise restricted in the sale of said products and commodities, and they, therefore, deny that said agreement between the defendants has either the necessary or the direct effect of restraining trade, or restricting competition.

The defendants further show unto the court that the said articles of agreement expressly forbid that the defendants shall, through the secretary of said association, or otherwise, enter into any agreement with wholesale dealers or manufacturers whereby they, the wholesale dealers or manufacturers, shall be in any wise precluded from selling to consumers; and provide that the secretary of said association shall, under no circumstances, enter into any agreement
29 with a wholesale dealer or manufacturer, that any member of said association will buy — him, or exact, in any case, that a wholesale dealer or manufacturer shall promise not to sell to consumers; that said agreement expressly stipulated that no result shall follow from the provisions of Article Seven of said articles of agreement, other than that members will not buy from a wholesale dealer or manufacturer who sells to consumers in competition with a mam-

ber of said association; that each and every wholesale dealer and manufacturer of said products, within the said two states, in so far as the defendants are in any wise concerned, are perfectly free and unrestrained to sell to consumers or to the members of said association on exactly equal terms, each with the other; that said articles of agreement were entered into freely and voluntarily by the members of said association, and that each member is at perfect liberty to withdraw therefrom, without penalty, at any time he or it may see fit; that no agreement, express or implied, exists now, or ever has existed, between the defendants and any one or all of the manufacturers and wholesale dealers within said two states, or elsewhere, which in any wise precludes any one or all of said wholesale dealers and manufacturers from selling to consumers in competition with defendants; and they say that, in fact, some wholesalers and manufacturers do sell to consumers in competition with them, and that some manufacturers and wholesalers make special efforts to sell to consumers, just as some, independently of the action and agreement of defendants, refrain from selling consumers.

Defendants now further state and show that, in so far as their said constitution and agreement have the effect, if any, to restrain competition in the retail trade from wholesale dealers, manufacturers and commission merchants, agents and brokers, and so far as it had a tendency, if any, toward the monopolizing of the retail trade, such effect is produced only by the fact that such traders are put to their election between such retail trade and the custom of these defendants; and these defendants have the natural and inalienable right to buy their wares from any dealers whom they choose to patronize ,if such dealers have a right to sell; and they have the further right to make known the reasons which move them to buy from one rather than another; and they have a right to agree together, and to let such agreement be known, that they will by preference give their custom to traders who shall so conduct their business as to allow to defendants the best opportunities for the maintenance and advancement of their legitimate and useful trade. And, if the action and constitution has any tendency to restrain trade, or restrict competition, or any tendency toward monopolization of the retail trade (which defendants do not admit) such restraint and monopoly are the indirect effects of what defendants have a lawful right to do, and are not the direct effects or purposes of defendants. The purposes of defendants to maintain and promote a lawful system of trade in legitimate and useful products are lawful; and the means adopted by them looking to that end are lawful. Defendants therefore deny that their said constitution and agreement is inimical to the public welfare, or is unlawful, or is a criminal conspiracy.

Defendants now, formally, and in the terms of the Code chapter on Trusts and Combines, deny that said agreement between the defendants has either the necessary or the direct effect of restraining trade, limiting or reducing the price of a commodity, limiting or increasing the production or output of a commodity, hindering competition in the production, manufacture, transpo-tation, sale or purchase

of a commodity, or of placing in the hands of others than the owners, their proper officers, agents and employés, the control of business to any extent, or of giving to others than the owners, their proper officers, agents, and employés, the power to dictate or control or manage business; or forming a pool of interests in the impo-tation, manufacture, production, transportation, or price of a commodity; and they deny that said agreement is inimical to the public welfare, or unlawful, or is a criminal conspiracy.

The constitution of defendants was known to the legislature which enacted said chapter, and was before it and was considered by that body, and was not by that body intended to be reached by that
31 chapter, as evidence of which fact defendants show that, when said association was formed as aforesaid, the legislature of the State of Mississippi was in special session and had been since the — day of January, 1906, and that a committee thereof had therefore investigated said association, as it had therefore existed and operated, and reported to said special session that said association, in the particulars by said report mentioned, had violated the laws of the State of Mississippi for the suppression of trusts and combines, and that, by joint resolution of the two houses of the legislature, it had instructed the attorney general of the state to prosecute the members of said association, under said laws, which were in all respects, save as to the imposition of penalties, the same as they are now written; and that the defendants, being apprised of the said action of the said legislature, met in regular annual session, adopted the "Constitution," or articles of agreement, as one eliminating all the practices of which the said report complained as violations of said laws, and sent a copy thereof to the said investigating committee, with the request that said committee present the same to the legislature as evidence of the indisposition of said association to violate the laws of the said state, and that, in consideration thereof, the said legislature would pass a resolution withdrawing its instructions to the attorney general, to prosecute the members of said association as aforesaid; and that, the upper house of the said legislature, in compliance with said request, unanimously passed a joint resolution withdrawing said instructions, for the reason that the action of the said association in adopting said constitution, or articles of agreement, and submitting the same to the legislature, showed that its members fully intended not to violate the laws of the State against trusts and combines; and that the true effect and import of said resolution was that the upper house of the said legislature did not consider that the action of said association, under its new articles of agreement then and now in force, would be a violation of the laws for the suppression of trusts and combines, which it had then reenacted as a part of the Code of 1906; and that, upon said resolution being sent to the lower house of the said legis-
32 lature, it was referred to the committee on Corporations, but never thereafter acted upon by it.

VI.

Answering now more directly and specifically to that feature of said constitution which has reference to the dealing in retail, trade

by wholesale dealers and manufacturers through commission merchants, agents and brokers who do not carry stocks, defendants, in order to save repetition, refer to and repeat, as to that form of unfair and unequal assault upon the retail trade as a system, what has already been said herein about the invasion of the retail trade by such wholesale dealers and manufacturers, Commission merchants, agents and brokers, who do not carry stocks, are in fact but intermediaries of the wholesale dealers and manufacturers, that have no capital invested, and no expense accounts of any consequence to bear; they have no stocks to exhibit for approval of, and selection by, consumers; they simply scalp the market; and defendants deny that the declination to buy from their principals, the wholesale dealers and manufacturers, is inimical to the public welfare, or unlawful, or a criminal conspiracy.

Defendants now aver and show that their said constitution and agreement were made, and are observed, by them in the exercise of their natural and common right to the enjoyment of liberty and property, whereby they have the right to buy and sell, to contract, and to contract with each other and all together, in order to foster in a lawful manner their lawful trade. And they aver and show that, if the legislature of the State of Mississippi did undertake, in *any* the said chapter of the Mississippi Code of 1906, entitled "Trusts and Combines," or by any or all of the provisions thereof, to deprive defendants of the right to make and maintain the association and constitution assailed in and by this suit, said chapter, and all the provisions thereof, are unconstitutional and void, because they violate the fourteenth amendment to the constitution of the United States by depriving defendants of their property without due process of law, and by denying to defendants the equal protection of the laws.

VII.

Defendants now aver further and show that the said chap-
33 ter of the Code of Mississippi of 1906, the chapter entitled "Trusts and Combines," being chapter 145 of said Code, is void because it violates the Fourteenth Amendment to the Constitution of the United States in this: that it is so framed as unlawfully and unconstitutionally to discriminate between citizens, dividing the same into classes and laying its inhibition upon citizens of one class, while not applying to those of other classes, without reasonable or lawful basis for the classification so made, in violation of the fourteenth Amendment to the Constitution of the United States, which prohibits any state to make or enforce any law which shall deny to any person within the jurisdiction of such state the equal protection of the laws.

For greater certainty, Respondents show and aver that such discrimination consists in the fact that the prohibitions and penalties of said chapter are laid upon those who manufacture and trade in and transport or monopolize commodities, but are not laid upon those citizens who combine to increase the cost of transportation of persons, or to increase the rate of wages, or to increase the cost of and charges for personal services and labor, the furnishing of informa-

tion and news, boarding and lodging accom-odations, or who monopolize the same, nor upon any classes of persons pursuing any sort of vocation except those trading in and manufacturing and transporting commodities, or who monopolize the same, The Legislature, Respondents aver, did not have the constitutional power to mark out and set aside for the condemnation of such said chapter and the penalities imposed therein, those classes of individuals commonly known as traders, manufacturers and carriers engaged in the transportation of commodities, or who monopolize the same, and excuse from its operation and condemnation all other classes of individuals who might similarly combine and might similarly undertake to regulate the charges and costs of their respective vocations. Such discrimination, respondents submit, is in violation of the Fourteenth Amendment to the Constitution of the United States as stated above, because it is a denial of the equal protection of the law.

34 VIII.

Defendants now further aver and show that the said chapter of the Code of Mississippi of 1906, is void because it violates the Fourteenth Amendment to the Constitution of the United States in this: that Section 1345 of said Code is as follows:

"1345. The same; conspiracy to impede, etc.—If two or more persons shall wilfully and maliciously combine or conspire together to obstruct or impede, by any act, or by any means of intimidation, the regular operation and conduct of the business of any railroad company, or to impede, hinder, or obstruct except by due process of law, the regular running of any locomotive engine, freight or passenger train on any railroad, or the labor and business of such railroad company, such persons, and each of them, shall, on conviction, be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months or both; but this section shall not apply to persons who merely quit the employment of a railroad company, whether by concert of action or otherwise."

Wherefore the laws of Mississippi as a whole in respect to trusts and combines, are discriminative and deny to defendants, and many other citizens of said state the equal protection of the laws, because they are denied the right to organize and make agreements in and about their business matters, for self protection, while at the same time such right is expressly conceded to railroad employés.

And now, having fully answered, Respondents pray to be hence dismissed without day, and with their reasonable costs in this behalf expended.

E. L. BROWN,
Solicitors for Defendants.

STATE OF MISSISSIPPI,
County of Yazoo:

Personally appeared before me, the undersigned officer in and for the county and state aforesaid, W. G. Harlow, who on oath
35 states, that he is one of the defendants to the bill exhibited in the above styled cause, and that he is Secretary and Treasurer

of the Retail Lumber Dealers Association of Mississippi and Louisiana, and that, the facts set forth in the foregoing answer as of his own knowledge are true as herein stated, and that the facts set forth from information and belief therein, he believes to be true.

W. G. HARLOW.

Sworn to and subscribed before me, this 19th day of December, 1907.

[SEAL.]

E. R. HOLMES,
Mayor and Ex-officio Notary Public.

36 In the Chancery Court of Hinds County, First Judicial District.

No. 3414.

STATE OF MISSISSIPPI
vs.
GRENADA LUMBER CO. et al.

This cause having been submitted at the January, 1908, Term of this Court on Original Bill, Answer and Exhibits and having been taken under advisement by the court, and having been duly considered, and the court being sati-fied that the organization of which defendants are members known as the Retail Lumber Dealers Association of Mississippi and Louisiana is a combination between certain Retail Lumber Dealers in restraint of trade and intended to hinder competition in the sale and purchase of a commodity and the same is inimical to the public welfare and unlawful. It is therefore ordered, adjudged and decreed that the temporary injunction in this case heretofore granted be and the same is hereby made perpetual and that the said Mississippi-Louisiana Retail Lumber Dealers Association is hereby dissolved and that defendants and the officers of the said Association are hereby perpetually enjoined from continuing the said organization, and from enforcing the constitution and by-laws of the said Association, from holding any meetings or transactions any business whatever in connection with said association, and that defendants be taxed with all costs in this case incurred for which execution may issue as at law.

Ordered, adjudged and decreed in vacation this 3rd day of March, 1908.

Filed March 3rd, 1908.

G. G. LYELL,
Chancellor.

37 STATE OF MISSISSIPPI ex Rel.
v.
RETAIL LUMBER DEALERS ASSOCIATION OF MISSISSIPPI AND LOUISIANA.

In the above entitled cause, the said defendant, The Retail Lumber Dealers' Association of Mississippi and Louisiana, having prayed

and obtained an appeal from the decree of the Chancery Court of Hinds County, Mississippi, First District, rendered on the 3rd day of March, 1908, it is hereby ordered that such decree shall operate as a supersedeas pending said appeal, on the execution by the said Association of its appeal bond conformably to law, in the penalty of Five Hundred dollars ($500.00).

Ordered, adjudged and decreed this the 5th day of March, 1908.

G. G. LYELL,
Chancellor.

Filed March 5th, 1909.

38 *Appeal Bond to the Supreme Court in Civil Suit, with Supersedeas.*

STATE OF MISSISSIPPI,
County Hinds:

STATE OF MISSISSIPPI
vs.
GRENADA LUMBER CO. et als.

The under-signed Retail Lumber Dealers Association of Mississippi and Louisiana as principal and P. B. Powell and S. C. Bedwell, the sureties agree and obligate themselves to pay to The State of Mississippi the sum of Five Hundred Dollars, unless the said principal obligor shall satisfy the decree rendered in the cause above named March 3rd, A. D. 1908, complained of and this day appealed from by the said principal obligor, and also such final decree as may be made in said cause, and all costs, if the said decree so complained of and appealed from, be affirmed by the Supreme Court.

Witness our Signature this 4th. day of March, A. D. 1908.

RETAIL LUMBER DEALERS ASSOCIATION
OF MISSISSIPPI AND LOUISIANA,
By E. L. BROWN, *Attorney.*
P. B. POWELL.
S. C. BEDWELL.

The sureties on the above bond, being by me duly sworn, deposed, that over their just debts and liabilities, and their contingent liabilities on other bonds, they were worth in visible property, not exempt by law from execution or attachment, as follows, to-wit:

The said P. B. Powwell, the sum of Five Hundred Dollars ($500.00). The said S. C. Bedwell the sum of Five Hundred Dollars ($500.00).

Subscribed and sworn to before me this 4th? day of March A. D. 1908.

F. S. COVERL,
Notary Public.
W. W. DOWNING, *Clerk,*
By S. LIVINGSTON, *D. C.*

39 STATE OF MISSISSIPPI,
Hinds County:

I, W. W. Downing, Clerk of the Chancery Court in and for said County and State, do hereby certify that the above and foregoing is a just, true and perfect transcript of a suit lately pending in the Chancery Court of the First District of Hinds County Mississippi wherein the State of Mississippi was Complainant, and The Grenada Lumber Company et als. were Defendants, and Numbered 3414 on the Docket of said court, as the same appears of record and on file in this office.

Given Under my hand and the Seal of said Court, at my office, in Jackson, in said County and State, this the 9th. day of March, A. D. 1908.

W. W. DOWNING, *Clerk.*
By THOMAS MOORE, *D. C.*

40 At the October Term, 1909.

STATE OF MISSISSIPPI,
In the Supreme Court:

No. 13301.

GRENADA LUMBER CO. et als.
vs.
STATE OF MISSISSIPPI.

Assignment of Errors.

Now come the appellants in the above styled cause and, as grounds for reversal of the decree appealed from, assign:

I. That the court erred in holding that the chapter in the Code of 1906 on Trusts and Combines, and especially Sections 5002, 5003 and 5006, in so far as the same is held to forbid the agreement by the bill complained of, is not violative of the fourteenth amendment to the constitution of the United States, as depriving Appellants of their property without due process of Law and denying to them the equal protection of the laws.

II. That the court erred in holding that the agreement in and by the Bill complained of is violative of said chapter and especially of said sections 5002, 5003 and 5006.

III. That the court below erred in holding that the chapter in the Mississippi Code of 1906, and especially sections 5002, 5003 and 5006, were and are not void on the ground that they violate Section 14 of the Constitution of the State of Mississippi, and also violate the *14th.* Fourteenth Amendment to the Constitution of the United States as being a deprivation of property and not by due process of law, in that the provisions contained within said chapter and sections unjustly and unduly discriminate against Manufacturers, traders and carriers in and of commodities.

For the reasons assigned, the appellants pray that the decree appealed from may be reversed and the bill dismissed.

E. L. BROWN AND
MAYES & LONGSTREET,
Counsel for Appellants.

41 March Term 1909, Monday, April 12th, 1909.

No. 13301.

RETAIL LUMBER DEALERS ASSOCIATION
vs.
THE STATE OF MISSISSIPPI.

Judgment of Supreme Court.

This cause having been submitted at a former term of this court on the record herein from the Chancery Court of Hinds County, and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order adjudge and decree that the final decree of said Chancery Court rendered in this cause on the 3rd. day of March 1908 be and the same is hereby affirmed, and that the appellee do have and recover of the appellant and P. B. Powell and S. C. Bedwell, sureties in the appeal bond, the cost of this cause in this court and in the lower court to be taxed & etc.

42 *Opinion S. Court of Mississippi.*

No. 13301.

RETAIL LUMBER DEALERS ASSOCIATION
vs.
THE STATE ex Rel.

W. R. HARPER, *Special J.:*

On or about the 14th day of March, 1906, certain persons, partnerships and corporations, then engaged in the retail lumber business in Louisiana and Mississippi, organized an association known as the "Retail Lumber Dealers Association of Mississippi and Louisiana." A constitution for the government of this association was duly adopted by them. Under the head of "Declaration of Purpose", which is a preamble to the constitution, we find, among others, the following provisions:—

"We realize the convenience, and the necessity, of the retail lumber dealer to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business.

We recognize the absolute right of every person, partnership, and

corporation to establish and maintain as many retail yards as they may wish, whensoever and wheresoever.

We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price, they may see fit.

We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists.

And, recognizing that, we, as retail dealers in lumber, sash doors and blinds, cannot meet competition from those from whom we buy,

we are pledged as members of this association to buy only
43 from manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stock commensurate with the demands of their communities, and we are pledged not to buy from lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants, agents or broker."

Article 2 of said Constitution provides as follows:

"The object of this association is and shall be to secure, and disseminate among its members any and all legal and proper information which may be of interest or value to any member, or members thereof, in his or their business as retail lumber dealers, and to carry into actual effect our 'Declaration of Purposes.'"

Article 3 of said Constitution provides as follows:

"SECTION 1. No rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

SECTION 2. No coercive measures of any kind shall be practiced or adopted towards any retailer, either to induce him to join the Association, or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this Association be used or allowed against any retailer for the reason that he may not be a member of the Association or to induce or persuade him to become such member.

SECTION 3. No promises or agreements shall be requisite to membership in this Association, save those provided in these 'Articles of Association and Declaration of Purpose', nor shall any members be restricted to any particular territory, but may compete any and everywhere."

Article 7 of said Constitution provides as follows:

"SECTION 1. Report of Secretary.—Any member of this Association having cause of complaint against a manufacturer or wholesale

dealer, or his agents, because of shipment to a consumer,
44 shall notify the Secretary of this Association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee, the purpose for which the material was or is to be used, and such other particulars as may be obtainable.

Such notice must be sent with or without information in detail, within thirty days after the receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring within fifty days after the first issue of membership list succeeding the acceptance of his application.

Upon receipt of such notice, the Secretary shall first ascertain whether or not the complaining member carries a stock commensurate with the demands of his community, and, if he finds that such stock is not carried, he shall ignore the complaint, unless upon application of such complaining member, the Executive Committee shall reverse his finding, but if he find that such stock is carried, he shall then notify the manufacturer or wholesaler that the rules of this association do not allow its members to buy from tjose manufacturers and wholesalers who sell to consumers, and unless such manufacturer or wholesaler shall satisfy the Secretary, that the complaint is not well founded the Secretary shall report the facts to the Executive Committee, and upon the approval of his finding by a majority of the Executive Committee, the Secretary shall then notify the members of this Association of such sale, and they shall discontinue to buy from such manufacturer or wholesaler until notified by the Secretary that such wholesaler or manufacturer does not sell to consumers where there is a retail dealer who carries a stock commensurate with the demands of his community, but this section shall not apply in cases where the business methods or financial condition of such retailer will not justify a manufacturer or wholesaler in dealing with him.

45 Under no circumstances shall the Secretary enter into any agreement with a manufacturer or wholesaler that any one of the Association members will deal with him, nor shall he in any case exact a promise from the wholesaler or manufacturer that he will not sell to consumers, nor shall any result other than that of the members refusing to buy from any such manufacturer or wholesaler, follow from the steps taken as hereby provided.

SECTION 2. The foregoing provisions, shall apply in reported cases of lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stock, and as against the manufacturers who sell to such commission merchants, agents or brokers.

SECTION 3. Each member, when he joins this Association, and once each year thereafter, and oftener if the Secretary shall request it, shall furnish the Secretary a list of those manufacturers and wholesalers, and their agents, from whom he makes purchases of lumber and other building materials."

Thereupon, on November 19th*m* 1906, the Attorney-General, in the name of the State, filed a bill, in which he set ont the foregoing facts, and alleged that said Association was acting in violation of Chapter 145, Code 1906, to-wit, the chapter on "Trusts and Combines", showing that said Association was a trust or combine in restraint of trade, and intending to hinder competition in the sale or purchase of a commodity, contrary to the provisions of said c*a*hpter.

Defendants answered, admitting all the substantial facts set out

in the bill, but denying that its association was an unlawful combination or conspiracy, either in restraint of trade, or in violation of any other provision of said chapter. After hearing the cause on bill and answer, the Chancellor in the court below held that the association was in violation of law, and granted a perpetual injunction, ordering that it be dissolved, and enjoining the further operation of said organization. And from this decree, the defendants
46 appealed.

We have, each of us, carefully read the able arguments, and laboriously reviewed the mass of authorities cited by counsel in this case. It is indisputable that a line of the older authorities, commencing with the Bohn case, in 54 Minn., 223, and ending with the Montgomery-Ward case in 150 Fed. Rep., 413, hold that at common law, and under the particular statutes therein construed, it is lawful for retailers to combine and agree not to purchase from wholesalers who sell direct to consumers, so long as they confine themselves to a simple withdrawal of their own patronage, without resorting to any agreement with the wholesaler direct, or threats, or fines, or other direct coercive measures. These courts base their decisions upon the theory that such a combination is a legitimate protective and defensive measure, and that since it is perfectly lawful for each individual retailer to withdraw his patronage from a wholesaler at any time, and for any cause, that it is equally lawful for them to combine to do what each might lawfully do individually. But the courts of Indiana, Georgia, Nebraska, and Tennessee, and other states, have expressly repudiated the grounds upon which the former decisions were rested, and declare the doctrine therein announced, that what one may lawfully do any number may combine to do, to be untrue and unsound, and these decisions cite many instances where the vice and harm lies in the combination alone. It was said in

Bailey v. Master Plumbers' Association, 46 L. R. A., 561, that

"It is entirely true, as in effect observed in Macauley Bros. vs. Tierney, 19 R. L. 255, 37 L. R. A., 455, Atl. 1, and in Bohn M'f'g Co. vs. Hollis, 54 Minn., 223, sub nom. Bohn M'f'g Co. v. Northwestern Lumbermen's Asso., 21 L. R. A. 337, 55 N. W. 1119, that, in the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal
47 right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But in our opinion, it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influ-

ences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference in legal contemplation between individual right and combined action in trade is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.' India Bagging Association v. Kock, 14 La. Ann. 164. Any one of several companies had the right to sell the whole or only a part, of its output to only such persons, in only such territory, and at only such prices, as it pleased yet it was inimical to the interest of the public and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose."

This latter view commends itself in our judgment, and appears to be founded upon sound reason and just observation.

Again, it is said that it must appear certain that the means adopted by the retailer will be effective, and that as a necessary result
48 of their action that competition will be stifled, and the freedom of trade restrained. This argument has met with favor with some courts, in construing the common law and particular statutes. But we take it, that the Legislature of this state must have had in view all of these various and vexing questions, and sought to set them at rest in the plain and explicit language used therein. Under our statute, which provides that a combination "intended to hinder competition in the * * * the sale or purchase of a commodity shall be a criminal conspiracy", it is unimportant to consider whether the means adopted are calculated to be effective or not. The vital question is the design, the purpose, the intent of the combination. And it is likewise unimportant to consider whether the means adopted be peaceable and otherwise lawful, if the purpose and intent of the combination be to accomplish the unlawful object.

Applying these principles to the instant case, it is plain that the express and avowed object and purpose of this combination was to prevent the wholesaler from competing with the retailer in selling to the consumer. Nor is this avowed purpose confined to a prevention of what is cometimes called "unfair" competition, but to any and all competition of every sort. So far as these retailers could prevent, it was their purpose and intent, if language means anything, to deter the wholesaler from competing with the retailer in selling to the consumer at any time, in any place, and at any price, by a threat of the withdrawal of their trade. This, we believe, is directly in violation of the plain letter of the statute. We can conceive how "unfair" competition by the wholesaler with the retailer might, under certain circumstances, destroy the retailer, to the ultimate detriment of the public, thus directly stifling competition; however, we have no such case before us, but only the case of a combination intended to destroy all competition by the wholesaler with the retailer, whether

fair or unfair. But even if the former case were here pre-
49 sented, it is not for the retailer, nor perhaps for this court even, to undertake to say what is an unfair competition, since the statutes of 1906 make no exception, and no such distinction appeared until the Legislature of 1908 so amended the act of 1906, as to itself define what was unfair competition, and declared a penalty therefor, thus making clear the purpose of the Legislature to require all persons to look to the law for protection against unfair competition, rather than to their own efforts and combinations, and to look to the law to define and declare what shall be unfair competition, rather than permit the courts or the parties in interest so to do.

It is further urged that this combination is not inimical to public welfare, and therefore, not unlawful. In the case of Barataria Canning Company v. Joulian, 80 Miss., 555, it was distinctly held that the words "Inimical to the public welfare," is not an added element of definition attached to each of the definitions already given in the *d*eparate sections of this statute, but that the offense is complete when shown to come within the terms of any section of the statute, as thereby, the Legislature, in whom the discretion is vested, by its very declaration determines said act to be inimical to the public welfare.

Finally, it is urged that the very existence of the retailer depends upon such combinations. This appeal is one to be made to the Legislature. But we cannot think that even as an economic proposition it is sound. The retailer has not lived and grown and thrived for these many hundred years without such factitious aids, to at last succumb to such fortuitous circumstances. His right to exist rests upon foundations. As long as he continues to faithfully serve the convenience and necessities of the people as he has in the past, he need have no fear of permanent harm from any manner of competition with the wholesaler within the law as it is now written, but he may be expected to continue to live and flourish by virtue of his own sturdy, individual self reliance, cultivated in
50 the benign atmosphere of unrestrained freedom of trade, and beneficent influences of a fair and healthy competition.

It appearing to us that the plain purpose of the instant association is to stifle competition between wholesaler and retailer in dealing with the consumer, and that such a combination with such an express and avowed purpose, is directly in violation of both the letter and the spirit of the statute above referred to, which statute makes no distinction between classes and kinds of competition which it seeks to preserve, and the decision of the Chancellor being in conformity with this view, the decree of the lower court is therefore

Affirmed.

51 UNITED STATES OF AMERICA,
State of Mississippi:

No. 13301.

STATE OF MISSISSIPPI ex rel.
v.
GRENADA LUMBER COMPANY et als.

To the Honorable Albert H. Whitfield, Chief Justice Supreme Court of the State of Mississippi:

The petition of the Grenada Lumber Company, of C. T. Stepp, of Bailey & Crenshaw, of Nott & Ward, of Veazey, Clark Co., of P. T. Callicott, of the E. H. Dunlap Manufacturing Company, of I. M. Eagan, of C. H. Parsons, of the Love Wagon Co., of L. F. Grisham, of Martin Brothers, of E. W. Pickens, of the Alexander Lumber Company, of the R. H. Barrett Lumber Company, of the Woods Lumber and Manufacturing Company, of the Finley Lumber Company, of the Itta Bena Lumber Company, of the Moorehead Lumber Company, of the King Hardware Company, of Hawkins Hodges, of the Pickens Brick and Lumber Company, of S. Bernheimer & Sons, of Tucker & Gabbert, of the Sumner Lumber Company, of the Shelby Lumber Company, of R. Jesty & Co., of Edward Loggins, of W. G. Harlow, of Sessions & Roland, of Cohn Brothers, of John T. Scroggins, of the Rosedale Lumber Company, of John L. Ash, of Oliver & Figg, of Banks & Company, of George B. Rye, of the Stiles-Tull Lumber Company, of King & Anderson, of J. M. Walker, of the Shaw Hardware & Lumber Company, of the Silver City Midnight Lumber Company, of the Holly Bluff Lumber Yard, of the Cline Holmes Lumber Company, of the Charleston Lumber Company, of the Mississippi Lumber Company, of the Barrett Grocery Company, of W. L. Sanderson, of J. W. Bermingham & Co., of E. M. Stebbins & Co., of the Caddo-Rapides Lumber Company, of Joseph W. Begnaud, of the Peoples Lumber Company, of J. E. Kibbs, of Sidney L. Egnew, of L. D. Spencer, of the Vodenhaumen Lumber Company, of A. E. Mouton, of the Bertha Lumber Company, of the Allen Manufacturing Company, of C. C. Hard-
52 man, of the Faught Lumber Company, of A. C. Skyles, of the Foster Creek Lumber Company, of the Ozone Lumber & Building Supply Company, of Leopold Elgutter, of the Victoria Lumber Company, of the Salem Lumber Yard, of the Billeaud Lumber Company, of the Central Manufacturing and Lumber Company, of the Rayville Lumber Company, of the Ascension Lumber Yard, and of the Caddo Lumber Company, Limited, respectfully shows that on the 12th. day of April, 1909, the said Supreme Court rendered judgment against your petitioners in a certain cause wherein your petitioners were appellants, and wherein the State of Mississippi, upon the relation of the Honorable R. V. Fletcher, Attorney General of the said State, was the Appellee, in and by which judgment the said Petitioners, being members of the Retail Lumber Dealers Association of Mississippi and Louisiana, were ad-

judged to be a trust in Violation of the statutes of the State of Mississippi in such case provided, and whereby such Association was dissolved and the enforcement of its by-laws and constitution was prohibited; and also petitioners were required to pay certain court costs, and which judgment of the said Supreme Court, in effect, awarded appropriate execution thereupon, as will appear by reference to the record and proceedings in said cause; that in said suit was drawn in question the validity of certain statutes of the said State of Mississippi on the ground of their being repugnant to the Constitution of the United States and the Fourteenth Amendment thereto, and the decision of the said Supreme Court of Mississippi was in favor of the validity of such statutes; and that in said suit the Petitioners, who were the Appellants, claimed a right under the Constitution and Statutes of the United States, and the decisions of the said Supreme Court was against the said right specially set up and claimed in such Constitution and statutes.

And the decision of the said Supreme Court of the State of Mississippi was final, and the said Supreme Court is the court of highest resort in said State.

53 Wherefore your petitioners are aggri-ved, and they pray for a writ of error with citation and supersedeas, returnable in the Supreme Court of the United States, on the 16th day of June, 1909.

And as in duty bound, they will ever pray, etc.

Grenada Lumber Company.
C. T. Stepp.
Bailey & Crenshaw.
Nott & Ward.
Veasey, Clark & Co.
P. T. Callicott.
E. H. Dunlap Manf. Co.
I. M. Eagan.
C. H. Parsons.
Love Wagon Co.
L. F. Grisham.
Martin Bros.
E. W. Pickens.
Alexander Lumber Company.
R. H. Barrett, Lumber Co.
Woods Lumber & Manf. Co.
Ozone Lumber & Buil*b*ing Supply Co.
Rayville Lumber Co.
Ascension Lumber Yard.
John L. Ash.
Oliver & Figg.
Banks & Company.
Geo. B. Rye.
Stiles-Tull Lumber Co.
King & Anderson.
I. M. Walker.
Shaw Hardware & Lumber Co.
Central Manf. & Lumber Co.
Finley Lumber Co.
Itta Bena Lumber Co.
Moorehead Lumber Co.
King Hardware Co.
Hawkins & Hodges.
Pickens Brick & Lumber Co.
S. Bernheimer & Sons.
Tucker & Gabbert.
Sumner Lumber Co.
Shelby Lumber Co.
R. Jesty & Co.
Edward Loggins.
W. G. Harlow.
Sessions Roland.
Cohn Bros.
John T. Scroggins.
Leopold Elgutter.
Victoria Lumber Co.
Charleston Lumber Co.
Mississippi Lumber Co.
Barrett Grocery Co.
W. L. Sanderson.
Salmen Lumber Yard.
Billeaud Lumber Co.
Caddo Lumber Co., Limited.
J. W. Bermingham & Co.
E. M. Stibbins, & Co.

Silver City-Midnight-Lumber Co.
Holly Bluff Lumber Yard.
Cline-Holmes Lumber Co.
54 Peoples Lumber Co.
J. E. Kibbs.
Sidney L. Egnew.
L. D. Spencer.
Vordenbaumen Lumber Co.
A. E. Mouton.
All by

Caddo-Rapides Lumber Co.
Joseph W. Regnaud.
Bertha Lumber Co.
Allen Manf. Co.
C. C. Hardman.
Faught Lumber Co.
A. C. Skyles.
Foster Creek Lumber Co.

EDWARD MAYES,
Atty. for Plffs. in Error.

STATE OF MISSISSIPPI:

Desiring to give Petitioners opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition and in the Assignment of Errors by which it is accompanied, it is ordered hereby that a writ of Error be and the same is hereby allowed to the said Court, and that the same be ma*id* a supersedeas, the bond in the penal sum of One Thousand Dollars also herewith presented, being hereby approved.

In testimony whereof witness my hand this the 17th day of May, 1909.

A. H. WHITFIELD,
Chief Justice Supreme Court of Mississippi.

55 No. 13,301.

THE GRENADA LUMBER COMPANY et als., Plaintiffs in Error,
vs.
STATE OF MISSISSIPPI ex Rel., Defendant in Error.

Know All Men by These Presents, That we, the said Grenada Lumber Company, C. T. Stepp, Bailey & Crenshaw, Nott & Ward, Veazey, Clark & Co., P. T. Callicott, E. H. Dunlap Manufacturing Co., I. M. Eagan, C. H. Parsons, Love Wagon Co., L. F. Grisham, Martin Brothers, E. W. Pickens, Alexander Lumber Co., R. H. Barrett Lumber Co., Woods Lumber & Manf. Co., Finley Lumber Co., Itta Bena Lumber Co., Moorehead Lumber Co., King Hardware Lumber Co., Hawkins & Hodges, Pickens Brick & Lumber Co., S. Bernheimer & Sons, Tucker & Gabbert, Sumner Lumber Co., Shelby Lumber Co., R. Jesty & Co., Edward Loggins, W. G. Harlow, Sessions & Roland, Cohn Brothers, John T. Scroggins, Rosedale Lumber Co., John L. Ash, Oliver & Figg, Banks & Company, George B. Rye, Stiles-Tull Lumber Co., King & Anderson, J. M. Walker, Shaw Hardware & Lumber Co., Silver City Midnight Lumber Co., Holly Bluff Lumber Yard, Clines-Holmes Lumber Co., Charleston Lumber Co., Mississippi Lumber Co., Barrett Grocery Co., W. L. Sanderson, J. W. Bermingham & Co., E. M. Stebbins & Co., Caddo-Rapides Lumber Co., Joseph W. Begnaud, Peoples Lumber Co., J. E. Kibbs, Sidney L. Egnew, L. D. Spencer, Vordenbaumen Lumber Co., A. E.

Mouton, Bertha Lumber Co., Allen Manufacturing Co., C. C. Hardman, Faught Lumber Co., A. C. Sykes, Foster Creek Lumber Co., Ozone Lumber & Building Supply Co., Leopold Elgutter, Victoria Lumber Co., Salem Lumber Yard, Billeaud Lumber Co., Central Manufacturing & Lumber Co., Rayville Lumber Co., Ascension Lumber Yard, and Caddo Lumber Co., Limited, as principals, and Commercial State Bank & Trust Co. and Bank of Yazoo City as sureties, are held and firmly bound unto the State of Mississippi in the sum of One Thousand Dollars ($1000.00) lawful money
56 of the United States of America, and to the payment of which well and truly to be made, the said principals and the said sureties bind themselves, their, and each of their, successors and assigns, jointly and severally, firmally by these presents.

Witness our signatures, this the 14th day of May, in the Year of our Lord One Thousand nine hundred and nine.

Whereas in the above entitled action the Supreme Court of the State of Mississippi rendered its judgment on the 12th day of April, 1909, affirming the decree of the Chancery Court of Hinds County, Mississippi, First District, and the said principals above named have obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Supreme Court of the State of Mississipp to reverse the judgment in the aforesaid suit, and the citation directed to the said State of Mississippi citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof;

Now the condition of this obligation is such that if the said principals above set forth shall prosecute their said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

BANK OF YAZOO CITY,
By H. M. LOVE, *Cashier.*
COMMERCIAL STATE BANK & TRUST CO.
H. B. LIGHTCAP, *Cashier.*
W. G. HARLOW.
SILVER CITY-MIDNIGHT LUMBER CO.,
By W. G. HARLOW, *President.*
BERTHA LUMBER CO.,
By W. G. HARLOW, *Agt.*
RETAIL LUMBER DEALERS ASSOCIATION OF MISSISSIPPI & LOUISIANA,
Per E. L. BROWN, *Agent & Attorney.*

57 United States of America to the State of Mississippi, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to Writ of Error filed in the Supreme Court of the State of Mississippi, wherein the Grenada Lumber Company, C. T. Stepp, Bailey & Crenshaw, Nott & Ward, Veazey, Clark & Co., P. T. Callicott, E. H. Dunlap Manufacturing Co., I. M.

Eagan, C. H. Parsons, Love Wagon Co., L. F. Grisham, Martin Brothers, E. W. Pickens, Alexander Lumber Company, Z. H. Barrett Lumber Co., Woods Lumber and Manufacturing Co., Finley Lumber Co., Itta Bena Lumber Co., Moorehaed Lumber Co., King Hardware Lumber Co., Hawkins & Hodges, Pickens Brick & Lumber Co., S. Bernheimer & Sons, Tucker & Gabbert, Sumner Lumber Company, Shelby Lumber Company, R. Jesty & Co., Edward Loggins, W. G. Harlow, Sessions & Roland, Cohn Brothers, John T. Scroggins, Rosedale Lumber Co., John L. Ash, Oliver & Figg, Banks & Company, George B. Rye, Stiles-Tull Lumber Company, King & Anderson, J. M. Walker, Shaw Hardware & Lumber Company, Silver City-Midnight Lumber Company, Holly Bluff Lumber Yard, Clines-Holmes Lumber Company, Charleston Lumber Company, Mississippi Lumber Co., Barrett Grocery Co., W. L. Sanderson, J. W. Bermingham, & Co., E. M. Stebbins & Co., Caddo-Rapides Lumber Co., Joseph W. Begnaud, Peoples Lumber Co., J. E. Kibbs, Sidney L. Egnew, L. D. Spencer, Vordenbaumen, Lumber Co., A. E. Mouton, Bertha Lumber Co., Allen Manufacturing Co., C. C. Hardman, Faught Lumber Company, A. C. Sykes, Foster Creek Lumber Co., Ozone Lumber & Building Supply Co., Leopold Elgutter, Victoria Lumber Co., Salem Lumber Yard, Billeaud Lumber Co., Central Manufacturing and Lumber Co., Rayville Lumber Co., Ascension Lumber Yard, and Caddo Lumber Company, Limited, are Plaintiffs in Error and your are Defendant in Error, to show cause, if any there be, why judgment rendered against the said Plaintiffs in Error as in the said Writ of Error mentioned, should not be
58 corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Whitfield, Chief Justice of the Supreme Court of the State of Mississippi, this the 19th day of May, 1909.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of Mississippi.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Received the within citation on the 20th day of May, 1909, and served the same on the same day on the Hon. J. Bowman Stirling, Attorney General of the State of Mississippi, personally, by reading the same to him, and also by delivering to him in his own hands a true and exact copy of the same; also delivered to him at the same time a true and exact copy of the Writ of Error in said cause issued in pursuance to the fiat of the Honorable Albert H. Whitfield, Chief Justice of the Supreme Court of Mississippi, by the Honorable L. B. Moseley, Clerk of the United States Circuit Court in and for the Southern District of Mississippi.

This the 20th day of May, A. D. 1909.

EDGAR S. WILSON,
U. S. Marshal,
By E. S. WILSON, JR.,
Deputy U. S. Marshal.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before me L. B. Moseley, Clerk of the Circuit Court of the United States in and for the Southern District of Mississippi, E. S. Wilson, Jr., a regular Deputy Marshal of the United States in and for the District and State aforesaid, duly appointed according to law, who being by me first duly sworn, on oath saith that the foregoing return made by him of a service of citation and a copy of the Writ of Error in this cause of the Grenada Lum-
59 ber Company et als., Plaintiffs in Error, against the State of Mississippi, Defendants in Error, made on the said defendant in Error on the 20th day of May, 1909, is true in every particular.

Sworn to and subscribed before me this the 20th day of May, 1909, as witness my signature and official seal.

L. B. MOSELEY, *Clerk*,
By B. L. TODD, JR., *D. C.*

60 No. 13301.

THE GRENADA LUMBER COMPANY et als., Plaintiffs in Error,
vs.
STATE OF MISSISSIPPI ex Rel., Defendant in Error.

Afterwards to wit: on the 17th day of May, 1909, before the Justice of the Supreme Court of the United States at the Capital in the City of Washington, came the said Grenada Lumber Company, C. T. Step, Bailey & Crenshaw, Nott & Ward, Veazey Clark & Co., P. T. Callicott, E. H. Dunlap Manufacturing Co., I. M. Eagan, C. H. Parsons, Love Wagon Co., L. F. Grisham, Martin Bros., E. W. Pickens, Aexander Lumber Company, R. H. Barrett Lumber Co., Woods Lumber & Manufacturing Co., Finley Lumber Co., Itta Bena Lumber Co., Moorehead Lumber Co., King Hardware Lumber Co., Hawkins & Hodges, Pickens Brick & Lumber Co., S. Bernheimer & Sons, Tucker & Gabbert, Sumner Lumber Company, Shelby Lumber Company, R. Jesty & Co., of Edward Loggins, of W. G. Harlow, Sessions & Roland, Cohn Brothers, John T. Scroggins, Rosedale Lumber Co., John L. Ash, Oliver & Figg, Banks & Company, George B. Rye, Stiles-Tull Lumber Co., King & Anderson, J. M. Walker, Shaw Hardware & Lumber *Co.* Company, Silver City-Midnight Lumber Company, Holly Bluff Lumber Yard, Cline-Holmes Lumber Company, Charleston Lumber Co., Mississippi Lumber Co., Barrett Grocery Co., W. L. Sanderson, J. W. Bermingham & Co., E. M. Stebbins & Co., Caddo-Rapides Lumber Co., Joseph W. Begnaud, Peoples Lumber Co., J. E. Kibbs, Sidney L. Egnew, L. D. Spencer, Vordenbaumen Lumber Co., A. E. Mouton, Bertha Lumber Co., Allen Manufacturing Company, C. C. Hardman, Faught Lumber Co., A. C. Sykes, Foster Creek Lumber Co., Ozone Lumber & Building Supply Co., Leopold Elgutter, Victoria Lumber Co., Salmen Lumber Yard, Billeaud Lumber Co., Central Manufacturing & Lumber Co., Rayville Lumber Co., Ascension Lumber Yard, and Caddo

Lumber Co., Limited, Plaintiffs in Error, by their, and each
61 of their attorneys, Edward Mayes, and say that in the record and proceedings aforesaid there is manifest error in the particulars following, to-wit:

1. The said Supreme Court of the State of Mississippi erred in rendering the said judgment of April 12th, 1909, and in failing and refusing to reverse the decree of the Chancery Court of Hinds County, Mississippi, for the reason that by such decree and by such judgment of said Supreme Court, the anti-trust statute of the State of Mississippi, to-wit: Chapter 145 of the Code of 1906, and especially Sections 5002, 5003 and 5004 thereof, were held applicable to the constitution and by-laws of the association formed and observed by plaintiffs in error, and to condemn and forbid the same, and the said association was held to be and adjudged a trust under said laws and its dissolution was finally ordered; whereas in truth the plaintiffs in error in the formation and carrying out of such association were exercising a right to contract and a right of property secured to them by the Fourteenth Amendment to the Constitution of the United States; and the said statutes of the State of Mississippi, so construed and applied, were void, as being an attempt on the part of such State to deprive the plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment aforesaid.

And the said Plaintiffs in Error above named in detail do pray, and each of them prays, that the judgment aforesaid be reversed, annulled and altogether held for naught, and that they be restored to all things which they have lost by action of the said judgment.

EDWARD MAYES,
Att'y for Plaintiffs in Error.

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a *jury* which is in the said Supreme Court before you or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit between the State of Mississippi as plaintiff, and the Grenada Lumber Company, C. T. Stepp, Bailey & Crenshaw, Nott & Ward, Veazey, Clark & Co., P. T. Callicott, E. H. Dunlap Manufacturing Co., I. M. Eagan, C. H. Parsons, Love Wagon Co., L. F. Grisham, Martin Brothers, E. W. Pickens, Alexander Lumber Company, R. H. Barrett Lumber Company, Woods Lumber & Manufacturing Company, Finley Lumber Co., Itta Bena Lumber Co., Moorhead Lumber Co., King Hardware Lumber Co., Hawkins & Hodges, Pickens Brick & Lumber Company, S. Bernheimer & Sons, Tucker & Gabbert, Sumner Lumber Co., Shelby Lumber Co., R. Jesty & Co., of Edward Loggins, of W. C. Harlow, Sessions & Roland, Cohn Brothers, John T. Scroggins, Rosedale Lumber Co., John L. Ash, Oliver & Figg, Banks & Company, George B. Rye, Styles-Tull Lumber Co., King

& Anderson, J. M. Walker, Shaw Hardware & Lumber Company, Silver City-Midnight Lumber Company, Holly Bluff Lumber Yard, Cline-Holmes Lumber Company, Charleston Lumber Company, Mississippi Lumber Company, Barrett Grocery Co., W. L. Sanderson, J. W. Bermingham & Co., E. M. Stebbins & Co., Caddo-Rapides Lumber Co., Joseph W. Regnaud, Peoples Lumber Co., J. E. Kibbs, Sydney L. Egnew, L. D. Spencer, Vordenbaumen Lumber Co., A. E. Moutch, Bertha Lumber Co., Allen Manufacturing Co., C. C. Hardman, Faught Lumber Company, A. C. Sykes, Foster Creek Lumber Co., Ozone Lumber & Building Supply Co., Leopold Elgutter, Victoria Lumber Co., Salmen Lumber Yard, Billeaud Lumber Co., Central Manufacturing and Lumber Co., Rayville Lumber Co., Ascension Lumber Yard, and Caddo Lumber Company, Limited,
63 as defendants, and wherein judgment was rendered in favor of the said plaintiff in said Court on the 12th day of April, 1909, A. D., against the said defendants, and in which suit was drawn in *the* question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States, and the Amendments thereto, and the decision of said Supreme Court was in favor of the validity thereof — a manifest error hath happened to the great damage of said defendants named as above specifically, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if *h*udgment therein be given, that thence, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with writ, so that you may have the same at Washington on the sixteenth day of June next, in the said Supreme Court, to be then and there heard, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what *was* right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of May, in the year of our Lord nineteen hundred and nine.

Witness, also, my signature, and the seal of the Circuit Court of the United States in and for the Southern District of Mis-
64 sissippi, this the day and year aforesaid.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk Circuit Court of United States —,
Southern District of Mississippi.

I, George C. Myers, Clerk of the Supreme Court of Mississippi, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the record and proceedings in said cause, duly certified and authenticated according to law, to the Honorable Supreme Court of the United States.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the City of Jackson, in the State of Mississippi, in the year of our Lord nineteen hundred and nine, and of the independence of the United States one hundred and thirty-second.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk of the Supreme Court of Mississippi.

[Endorsed:] 13301. Grenada Lumber Co. et als., Pl'ffs in Error, vs. The State of Mississippi, Def't in Error. Writ of Error and Return. Filed May 22, 1909. Geo. C. Myers, Clerk, By W. J. Brown, D. C.

65 SUPREME COURT,
State of Mississippi, ss:

I, Geo. C. Myers, Clerk of the said Court, do hereby certify that was lodged with me as such Clerk on May 18th 1909, in the matter of Retail Lumber Dealers Association versus The State of Mississippi ex rel. the original appeal bond of which a copy is herein set forth, also on May 22nd 1909, two copies of the writ of error, one for each defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Jackson, Miss., this May 24th, 1909.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

SUPREME COURT,
State of Mississippi, ss:

I, Geo. C. Myers, Clerk of said Court, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are true, full, and correct copies of the papers, each and all of them, constituting the record in the said Supreme Court of the State of Mississippi, in the case of the Retail Lumber Dealers Association versus The State of Mississippi ex rel. all of which are now on file in my office and which taken together, constitute the record in said Supreme Court of the State of Mississippi.

I do further certify that the said Papers and documents so constituting such record are as follows:

1. Transcript of record on appeal from the Chancery Court of Hinds County.
2. Assignment of errors in Supreme Court of Mississippi.
3. Final judgment of Supreme Court of Mississippi.
4. Opinion of Supreme Court of Mississippi.
5. Petition and order for writ of error.
6. Appeal bond to United States Supreme Court.
7. Citation and return.

8. Writ of error and return.
9. Assignment of errors in United States Supreme Court.

Given under my hand and seal of said Supreme Court of Mississippi at Jackson in the State of Mississippi, this the 24th day of May A. D. 1909, and in the one hundred and thirty-third year of the Independence of the United States of America.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS, *Clerk.*

Endorsed on cover: File No. 21,719. Mississippi supreme court. Term No. 493. Grenada Lumber Company, C. T. Stepp, Bailey & Crenshaw et al., plaintiffs in error, vs. The State of Mississippi. Filed June 11th, 1909. File No. 21,719.

THE AGREEMENT COMPLAINED OF.

We realize the convenience, and the necessity of the retail lumber dealer to every community, and **we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business.**

We recognize the absolute right of every person, partnership, and corporation to establish and maintain as many retail yards as they may wish, whensoever and wheresoever.

We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price, they may see fit.

We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition, where any exists.

And, recognizing that, we, as retail dealers in lumber, sash, doors and blinds, **cannot meet competition with those from whom we buy,** we are pledged as members of this Association **to buy only of manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stocks commensurate with the demands of their communities,** and we are pledged not to buy of lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants, agents or broker.

The object of this Association is and shall be to secure, and disseminate among its members, any and all legal and proper information which may be of interest or value to any member, or members thereof, in his or their business as retail lumber dealers, and to carry into actual effect our "Declaration of Purpose."

No rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

No coercive measures of any kind shall be practiced or adopted towards any retailer, either to induce him to join the Association, or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this Association be used or allowed against any retailer for the reason that he may not be a member of the Association, or to induce or persuade him to become such member.

No promises or agreements shall be requisite to membership in this Association, save those provided in these "Articles of Association and Declaration of Purpose", nor shall any members be restricted to any particular territory but may compete any and everywhere.

Any member of this Association having cause of complaint against a manufacturer or wholesale dealer, or his agents, because of shipment to a consumer, shall notify the secretary of this Association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee, the purpose for which the material was or is to be used, and such other particulars as may be obtainable.

Such notice must be sent with or without information in detail, within thirty days after the receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring within fifteen days after the first issue of membership list succeeding the acceptance of his application.

Upon receipt of such notice, the **secretary shall first ascertain whether or not the complaining member carries a stock commensurate with the demands of his community,** and, **if he finds that such stock is not carried, he shall ignore the complaint,** unless upon application of such complaining member, the Executive Committee shall reverse his finding, but if he find that such stock is carried, he shall then notify the manufacturer or wholesaler that the rules of this Association do not allow its members to buy of those manufacturers and wholesalers who sell to consumers, and, **unless such manufacturer or wholesaler shall satisfy the secretary that the complaint is not well founded, the secretary shall report the facts to the Executive Committee,** and **upon the approval of his finding by a majority of the Executive Committee, the secretary shall then notify the members of this Association**

of such sale, and they shall discontinue to buy of such wholesaler or manufacturer until notified by the secretary that such wholesaler or manufacturer does not sell to consumers where there is a retail dealer who carries a stock commensurate with the demands of his community, but this section shall not apply where the business methods or financial condition of such retailer will not justify a manufacturer or wholesaler in dealing with him.

Under no circumstances shall the secretary enter into any agreement with a manufacturer or wholesaler that any one of the Association members will deal with him, nor shall he in any case exact a promise from the wholesaler that he will not sell to consumers, nor shall any result other than that of the members refusing to buy of any such manufacturer or wholesaler, follow from the steps hereby provided for.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

NUMBER 493.

GRENADA LUMBER COMPANY, ET ALS., Plaintiffs in Error,

vs.

STATE OF MISSISSIPPI, Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The emphasis used throughout this brief is ours.

In March, 1906, the voluntary association of retail lumber dealers in the two states of Mississippi and Louisiana, designated in this record as the Retail Lumber Dealers Association of Mississippi and Louisiana, then having been in existence for some years, were under specific charges made by a legislative committee of the Mississippi Legislature, of having violated the anti-trust laws of that state, and its Attorney General had been, by concurrent resolution of that body, instructed to proceed against that Association under those laws.

That Association met, consulted counsel, adopted the articles of association by this proceeding assailed as illegal, and presented them to the legislature, then still in session, as rules of conduct for the Association eliminating all features to which its committee report had objected, and as not in violation of the law that body was then re-enacting, with the request that it withdraw its instructions to the Attorney General to prosecute the associated members, thus bringing it to public notoriety and legislative attention all that is complained of in and by this proceeding. The upper house of that body passed a resolution withdrawing its said instructions to the Attorney General, and sent the same

to the lower house to be concurred in, but that house referred the same to its committee on corporations and it was there lost sight of.

The plaintiffs in error thereafter and until November, 1907, continued to maintain their agreement with the undoubted approval and sanction of the Mississippi State Senate, and, from the unconcern of the House of Representatives, may be reasonably inferred its approval and sanction also.

The bill in this cause was then exhibited by the Attorney General for the purpose of testing the legality of the agreement; but no claim was made against the members, in view of the aforementioned circumstances, for the penalties provided for by the statute, the then incumbent of that office feeling that they should not suffer from the mistaken judgment of their counsel and the legislature, should the court find the agreement to be illegal, notwitstanding such judgments.

The bill was answered by the plaintiffs in error in full confidence that their agreement was legal and could not be made illegal, although they might have demurred to the prayer for an answer on the ground that the bill called for admissions which might be held to incriminate them.

The cause was tried on bill and answer, practically an agreed case, the court of original jurisdiction held the agreement illegal, dissolved the Association, and perpetually enjoined its existence; that decree was appealed from and affirmed, and a writ of error to this court was sued out.

The writ of error being sued out, and the office of Attorney General having changed incumbents, as the motion of certain of plaintiffs in error show, suit was instituted against seventy-seven plaintiffs in error for the enormous minimum sum of $14,184,000.00, about ten per centum of the assessed valuation of all the property within the state, and more than fourteen times the entire sum of this world's goods possessed by all the defendants, and a maximum sum of $354,600,000.00, more than twice the assessed valuation of the entire state, or a minimum of $197,000.00 and maximum of $4,925,000.00 fine upon each of the plaintiffs in error, and which penalties were accumulating for about eighteen months while this proceeding was pending

in the state courts to test the validity of a statute, the most extreme ever yet enacted.

Fifteen of the plaintiffs in error, as shown by their motion, have settled their liabilities under the statute, by a dismissal of their appeal to this court and the payment of $800.00 each, the dismissal of the appeal being a condition precedent to a settlement on any terms less than the whole sum sued for as to each.

The bill alleges that the Association was formed "for certain objects and purposes fully set forth in the articles of agreement" exhibited to the bill; that the defendants are all competitors one with the other and each with all the others; and that the agreement is fully executed by the defendants; all of which is admitted by the answer.

The bill also alleges that the direct and necessary effect of the agreement is to limit and destroy competition because the defendants compose a vast majority of the retailers of lumber within the two states of Mississippi and Louisiana, and the wholesalers and manufacturers are all under the necessity of refusing to sell to consumers, **where the defendants do business,** under penalty of losing the trade of all the defendants; and it then charges **seriatim,** that the agreement violates each sub-section of section 5002 of the Mississippi code of 1906 in the language of the Act, all of which is denied by the answer, which shows that there are about 257 retailers and about 2400 wholesalers and manufacturers of lumber within the two states, and only seventy-seven retailers who are members of the Association; and that, of the 2400 wholesalers and manufacturers, there are more than are required to supply defendants with lumber and its products, who, for perfectly good business reasons of their own, and independently of any action of the Association, do not, and never would, sell to consumers. The bill also alleges that it was the purpose and object of the defendants, by said agreement, to prevent all competition in lumber products between them and wholesalers and manufacturers thereof, which the answer denies,

> **"And avers the truth to be that the purpose and object of the said Association are to promote and foster the trade and enhance the business and legitimate interests of the members, by purchasing from only those wholesale dealers in, and manufacturers of, lumber and its products, whose business policies are more favorable to the business of said members; and the**

defendants further deny that the said agreement between themselves has the necessary effect of limiting and destroying competition, and they deny that any wholesale dealer in, or manufacturer of, lumber and its products, is placed under any necessity by said agreement of refusing to sell direct to consumers thereof, and aver that, if the action contemplated by said agreement should or does cause any wholesale dealer or manufacturer to refrain from selling direct to consumers, it would only be because he, of his own free choice, would rather have the trade of the defendants than that of such customers; and that, if it be true that competition is lessened or hindered by said agreement, the defendants show that such result is only incidentally, and not directly, the result thereof, and that all wholesale dealers and manufactureres are at perfect liberty to choose the trade of consumers rather than that of the defendants, if they prefer it."

The answer further avers:

"The defendants further show unto the court that the said articles of agreement expressly forbid that the defendants shall, through the secretary of the Association, or otherwise, enter into any agreement with wholesale dealers or manufacturers whereby they, the wholesale dealers and manufacturers, shall be in any wise precluded from selling to consumers; and provide that the secretary of said Association shall, under no circumstances, enter into any agreement with a wholesale dealer or manufacturer, that any member of said Association will buy of him, or exact, in any case, that a wholesale dealer or manufacturer shall promise not to sell to consumers; that said agreement expressly stipulated that no result shall follow from the provisions of Article Seven of said Articles of Agreement, other than members will not buy from a wholesale dealer or manufacturer who sells to consumers in competition with a member of said Association; that each and every wholesale dealer and manufacturer of said products, within the two states, in so far as the defendants are in any wise concerned, are perfectly free and unrestrained to sell to consumers or to members of said Association on exactly equal terms, each with the other; **that said articles of agreement were entered into freely and voluntarily by the members of said Association, and that each member is at perfect liberty to withdraw therefrom, without penalty, at any time he or it may see fit;** that no agreement, express or implied, exists now, or ever has existed, between defendants and any one or all of the manufacturers and wholesalers within the two states, or elsewhere, which in any wise precludes any one or all of said wholesalers and manufacturers from selling to consumers in competition with defendants; and they say that, in fact, some wholesalers and manufacturers do sell to consumers

in competition with them, and that **some manufacturers and wholesalers make special efforts to sell to consumers,** just as some, independently of the action and agreement of defendants, refrain from selling to consumers."

The answer further avers: "Defendants now further state and show that, in so far as their said constitution and agreement have the effect, if any, to restrain competition in the retail trade from wholesale dealers, manufacturers and commission merchants, agents and brokers, and in so far as it had a tendency, if any, toward monopolizing the retail trade, **such effect is produced only by the fact that such traders are put to their election between such retail trade and the custom of these defendants,** and these defendants have the natural and inalienable right to buy their wares from any dealers whom they choose to patronize, if such dealers have a right to sell; and they have the further right to make known the reasons which move them to buy from one rather than another; and they have a right to agree together, and to let such agreement be known, **that they will by preference give their custom to traders who shall so conduct their business as to allow to defendants the best opportunities for the maintenance and advancement of their legitimate and useful trade. And, if the action and constitution have any tendency to restrain trade, or restrict competition, or any tendency towards monopolization of the retail trade (which defendants do not admit), such restraint and monopoly are the indirect effects of what defendants have a lawful right to do, and are not the direct effects, or purposes of defendants."**

The purpose, intent and object of the Association alleged by the bill having been expressly denied by the answer, the intent found by the court must by it have been inferred from the articles of association, so we must consider them as a whole, in order to ascertain the intent and purpose to be inferred from them, and which are the basis of the state's court assertion that, "the express and avowed object and purpose of this combination was to prevent the wholesaler from competing with the retailer in selling to the consumer," and that, "this avowed purpose is not confined to a prevention of what is sometimes called unfair competition, but to any and all competition of any and every sort", and that, "it was their intent and purpose, if language means anything, to deter the wholesaler from competing with the retailer in selling to the consumer at any time, in any place, and at any price, by a threat of the withdrawal of their trade." This is the entire basis of the opinion of the court; its quotation from the Bailey

case is wholly outside of anything called for by the facts of this case, since the effect of the agreement is not the criterion of legality.

The only language of the agreement possibly conveying the idea of an intent to deter or hinder competition is that "we also recognize the disastrous consequences which result to the retailer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition", and, in order to infer such intent from the language of the agreement, it must be considered separate and apart from what precedes and follows,—it must be absolutely isolated from the context.

Look at the declaration of purpose and agreement as a whole, and we find it to be equivalent to this: We, being retailers, are interested in the general welfare of the retail lumber business; we recognize the right of every one to maintain retail lumber yards at any place whatever; we recognize the right of every wholesaler and manufacturer to sell to whomsoever, wheresoever, and at whatever price, they may see fit; we have realized the disastrous consequences of competing with wholesalers and manufacturers, and realize the necessity of knowledge as to which of them sell where we do business; we must, in the nature of our trade, buy of wholesalers and manufacturers; we know that we cannot meet competition **with those wholesalers and manufacturers from whom we buy,** or from commission merchants, agents and brokers who do not carry stocks, and who (as shown by the answer) are **but intermediaries of the wholesalers and manufacturers;** there are (as shown by the answer, and as the court would judicially know anyway) more wholesalers and manufacturers, who, for perfectly good business reasons of their own, and independently of any action we might take, do not and would not sell to consumers; and we hereby pledge ourselves to buy only of those manufacturers and wholesalers **who do not sell to consumers where retailers do business;** we will place our business with those whose business policy favors our business interests, and with those **who are not our competitors,** because **we cannot** compete with competitors **from whom we buy;** but no rules, regulations or by-laws shall be adopted in any manner stifling competition, regulating prices, dividing territory, restraining

trade, pooling profits, or limiting production, and no coercive measures shall be employed to induce a retailer to join this Association, or to refrain from buying of any manufacturer; nor shall any discriminating practices be used against one not a member; it shall be the duty of each member having information of a sale by a manufacturer to consumers to notify the secretary thereof; it shall be the duty of the secretary, upon ascertaining that such sale was so made, to notify all the members thereof; and the members shall not thereafter buy of any such wholesaler or manufacturer.

Of course, the remark of the court that the purpose and object of the Association to prevent wholesalers from selling to consumers were "express" is a mere inadvertence; and its remark that such purpose and object were "avowed" simply means that the action of the Association was open, and that, from such action, the court inferred the purpose and object which the statute forbids. In the argument, it will be demonstrated, **fortified by decision of this court,** that the "intent, purpose and design," which the state court holds the statute prohibits, and which are condemned by the **decision** in this case, are, not only some such main purpose, intent and design, but such as may be inferred from an act the parties may be said to have foreseen would or **might,** though not necessarily, result in a hindrance of competition, yet merely collateral or incidental to some other main object sought to be attained, and not the object for the sake of which the agreement was entered into.

The answer also shows, and this court judicially takes notice, that manufacturers and wholesalers have long observed the practice of not selling where their retail customers do business in almost every line of commerce and manufactures, and that the agreement, therefore, is that in order to be admitted to competition for the business of the retailers, wholesalers and manufacturers shall but observe the course of trade which has resulted in the **institutional** differences between them and retailers, as distinguished from that practice which has been the foundation of the universal cry against the Standard Oil Company,—the annihilation of the retail dealer.

The agreement, in effect, is that "we, as retailers, have to buy of manufacturers and wholesalers; we can not compete with those of them **from whom we buy;** there are those of them who are

not our competitiors; we can gather and disseminate information as to who they are; and we will buy only of those who are not our competitors; towards those who are our competitors, we will adopt **'a mere passive, let-alone, policy, a withdrawal of all business relations, intercourse and fellowship'**, and leave them to the trade of consumers, if they prefer it to ours, said to be a lawful agreement by **every court which ever passed upon it,** including the courts of Indiana, Tennessee, Georgia, and Nebraska, by the very cases in the mind of the state court when writing the opinion in this case, as well as by the **'older authorities, beginning with the Bohn case' " (decided in 1893,) "and ending with the Montgomery Ward case" (decided since this suit was commenced).**

THE PROTECTION OF THE FOURTEENTH AMENDMENT CLAIMED.

The protection of the Fourteenth Amendment is set up, by way of a plea embodied in the answer, in this wise:

> "Defendants now aver and show that their said constitution and agreement were made, and are observed, by them in the exercise of their natural and common right to the enjoyment of liberty and property, whereby they have the right to buy and sell, to contract, and to contract with each other and all together in order to foster in a lawful manner their lawful trade. And they aver and show that, if the legislature of the state of Mississippi did undertake, in and by the said chapter of the Mississippi code of 1906, entitled, 'Trusts and Combines,' or by any or all of the provisions thereof, to deprive defendants of the right to make and maintain the association and constitution assailed in and by this suit, said chapter and all the provisions thereof are unconstitutional and void because they violate the Fourteenth Amendment to the Constitution of the United States by depriving defendants of their property without due process of law, and by denying to defendants the equal protection of the laws."

THE ASSIGNMENT OF ERRORS.

This paragraph of the answer is the foundation for the writ of error herein sued out, the other constitutional grounds pleaded having been waived in the court below. The assignment of error is as follows:

> "The said Supreme Court of the State of Mississippi erred in rendering the said judgment of April 12, 1909, and in

failing and refusing to reverse the decree of the Chancery Court of Hinds County, Mississippi, for the reason that by such decree, and by such judgment of said Supreme Court, the anti-trust statute of the State of Mississippi, to-wit, chapter 145 of the Code of 1906, and especially sections 5002, 5003 and 5004 thereof, were held applicable to the constitution and by-laws of the association formed and observed by plaintiffs in error, and to condemn and forbid the same, and the said association was held and adjudged a trust under said laws and its dissolution was finally ordered; whereas in truth the plaintiffs in error in the formation and carrying out of such association were exercising a right to contract and a right of property secured to them by the Fourteenth Amendment to the Constitution of the United States; and that the said statutes of the State of Mississippi, so construed and applied, were void, as being an attempt on the part of such state to deprive plaintiffs in error of their property without due process of law, in violation of the Fourteenth Amendment aforesaid."

This assignment covers the propositions: The legislative Act is an arbitrary and unreasonable interference with plaintiffs in error's property right of contract, and not within the police power of the state; the enormous and excessive penalties provided for by the Act are calculated and intended to intimidate citizens into submission to the arbitrary terms of the statute rather than under go the consequences of an unsuccessful attempt to resist them in the courts; the statute, as construed by the state court, takes away from the courts the power to determine whether such property right is reasonably, and in the interest of the public, taken away from the citizen.

THE MISSISSIPPI TRUST AND COMBINE ACT.

So much of section 5002, Mississippi Code of 1906, as is invoked by the bill, reads as follows:

"**5002.** (4437) **Definition of term; criminal conspiracy** (laws 1900, ch. 88).—A trust and combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the other:

(a) In restraint of trade;
(b) To limit, increase or reduce the price of a commodity;
(c) To limit, increase or reduce the production or output of a commodity;

(d) **Intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;**

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificates of stock of any trust or combine;

(g) To place the control, to any extent, of business, or of the products and earnings thereof, in the power of trustees, by whatever name called;

(h) By which any other person than themselves, their proper officers, agents, and employes shall, or shall have the power to dictate or control the management of business; or,

(i) To unite or pool interests in the importation, manufacture, production, transportation or price of a commodity; and is inimical to the public welfare, unlawful and a criminal conspiracy."

The penalty recoverable is provided by section 5004, reading as follows:

"**5004** (4439) **Penalty for violation.**—Any person, corporation, partnership, firm or association, or any representative thereof, violating any of the provisions of this chapter, shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalty in such cases to be recovered by an action in the name of the state at the relation of the attorney general or district attorney. It shall be the duty of the several circuit judges of the state to specially call attention of the grand jury of their respective districts to this provision."

In addition to the above penalty, section 5007 provides as follows:

"**5007** (4440) **Actions against, for damages.**—Any person injured or damaged by a trust or combine as herein defined, or its effects, direct or indirect, may, in each instance, of such injury or damage, recover the sum of five hundred dollars, and all actual damages; and he may maintain his action therefor against one or more of the parties to the trust or combine, their attorneys, officers and agents, and that whether or not all parties to the trust and combine be known and whether or not the trust and combine were made or shall exist in this state. And in any suit under this section, proof by the party plaintiff that he has been compelled to pay more for any commodity, or to pay more for any service rendered by any corporation exercising a public franchise, by reason of the unlawful act or agreement of the defendant trust,

its officers, agents or attorneys, than he would have been compelled to give or accept, but for such unlawful act or agreement, shall be conclusive evidence of damage, and in every such case proof of an unlawful purpose or agreement to raise or lower price or cost shall be conclusive evidence that such price or cost was raised or lowered by reason of such purpose or agreement."

THE CONSTRUCTION PLACED UPON THE STATUTE BY THE STATE COURT.

The established rule of this court, in testing the constitutionality of a statute, being to adopt the construction, correct or incorrect, or even absurd, placed upon it by the state court, it is pertinent to next review the decisions of the Mississippi court of last resort involving a construction of the Act involved.

Canning Co. vs. Joullan, 80 Miss., 555, involved an agreement whereby the latter bound himself to sell to the former, for a period of three months, all, except three cars per month, of the cove oysters which he might pack within that period, and not to sell the three cars retained at prices lower than those at which the former might offer its product for sale. The agreement was held unenforceable as being within the Act, as might have been expected, but the court, in response to the proposition, pressed in argument by brief, that the agreement was not "inimical to the public welfare", said, "The words 'and is inimical to the public welfare, unlawful and a criminal conspiracy' are the mere declaration of the effect of a trust, and not an added element of definition, attaching to each of the definitions already perfectly given * * * * in paragraphs a, to i, inclusive," which is a quite unequivocal statement that agreements coming within the letter of the Act were by it prohibited, whether detrimental to the public interest or not; and, but for the fact that this utterance was **dictum** and the extreme view indicated, the profession would have thereafter looked for the condemnation of any agreement within the literal terms of the statute.

But **Railroad Company vs. Searles,** 85 Miss., 520, was later decided, and, while utterances to support either a literal or liberal construction,—liberal or literal either towards the combination or the prosecution,—it was thought, from its apparently more deliberate utterances, that a rather liberal view was to be

taken of the statute. It was distinctly said and repeated that none but combinations inimical to the public welfare were forbidden, and that none except those "the direct and necessary effect" of which would be to restrict competition were by it prohibited, while it was also said that such "probable effect" would render the combination obnoxious to the statute. This case has been very justly termed "the chameleon case". It supports either side of almost any imaginable trust case, in some utterances or others, but all it said and decided, not in line with the decisions in this and the Joulian cases, may now, in so far as any case coming before the court may be concerned, be regarded as the merest and idlest **dictum**, for, by the next case decided, all there said tending towards a construction prohibiting **all** combinations was selected, quoted and approved as if there was no utterance tending the other way, and it is thereby made manifest that the court had come back to the radical views entertained and indicated by the Canning Company case.

That case was **Kosciusko Oil Co. vs. Wilson Oil Co.**, 90 Miss., 551, involving an agreement between two oil mills whereby one was precluded from buying seed within the territory of the other,—a clear restriction of competition by a division of territory,—which was held unlawful, of course. The same Chief Justice who wrote the opinion in the Canning Company case, **supra**, wrote the opinion in this case, and took occasion to bring the Searles case into harmony with the expression quoted from the Canning Company case in this wise:

> "We said in the case of **Yazoo, etc., R. R. Co. v. Searles**, 85 Miss., 528, that the phrase, 'inimical to the public welfare,' was a legislative declaration that **all contracts condemned by this anti-trust statute were so** 'inimical, unlawful, and were a criminal conspiracy.' **It is not left to the courts to say that such contracts are inimical to the public welfare, but the legislature itself has characterized such contracts as being inimical to the public welfare by this legislative declaration.** Whenever, therefore, it is shown that a contract is of the **kind mentioned in the Act, it is by legislative declaration instantly made a contract, 'inimical to the public welfare, unlawful** and a criminal conspiracy'. * * * * That case again declared that **'all contracts,** whether express or implied, which would **necessarily** or **probably** have any of the ill effects therein forbidden, were declared to be violative of the announced public policy of the state.' * * * * * * And again that case de-

> clared that **'the test, and the only test,** in determining the validity of a contract under this act, **is not what the intent of the parties may be,** not what form the combination has taken, but what will its **probable** effect be.' "

The case at bar is the most radical of all, but logically follows the utterances of the Canning Company and the Oil Mill cases, and the most radical ones of the Searles case. It **holds,** not merely says, that the statute condemns every combination coming within its literal terms, regardless of results, regardless of common law rules and definitions, and that there is no limit to the police power in respect of so-called anti-trust statutes.

Since effect, direct or indirect, is not the criterion of legality, the quotation from the Bailey case is not in point. The court, however, is mistaken in the notion that the line of cases following the Bohn case are based upon the idea that what one man may lawfully do, any number may unite in doing. That remark was due, as the court said, to the great stress laid by counsel upon the number of the combination. That may, or may not be, a sound proposition, but the illustrations used in the Bailey case are not illustrative, because one man cannot restrict competition, or restrain trade, legally speaking, but two or more can, and that was what was done in the cases used for illustration. The true basis of that line of cases is that the agreement is a "legitimate protective and defensive measure". The Bailey case has for its basis that feature which this court held illegal in the case of **Montague vs. Lowry,** 193, U. S., 38, while this case is, in principle, on-all-fours with the case of **Anderson vs. United States,** 171 U. S., 604.

To the contention that the statute should be construed to prohibit only agreements which have the direct and necessary effect of restricting competition, the court answers that the legislature had in mind this vexing question, and set it at rest by prohibiting an intent to hinder competition, and that it is unimportant to inquire whether the agreement be even calculated to resrtict competition, or whether it be otherwise peaceable and lawful. A restriction of competition is immaterial, only intent is material.

To the contention that the competition of the wholesaler with his retail customer was unfair competition, the court replied that it was not unfair, but that, if it were, it is not for the retailer,

or for the court, to determine that question, there being no exceptions in the statute, and traders must look to the law, and not to their own efforts, or to the courts, to protect against the same.

To the contention that the agreement was not within the statute, because not "inimical to the public welfare", the court said it was settled by the Canning Company case, that the offense is complete if within the terms of any section of the statute, because the legislature, in whom is "vested the discretion," vested finally, wholly and conclusively, **"has by its very declaration** declared it to be so inimical," fully in line with the construction of the Oil Mill case, where it said: "It is not left to the courts to say that such contracts are 'inimical to the public welfare', but the legislature itself has characterized such contracts as 'inimical to the public welfare' by this legislative declaration. Whenever, therefore, it is shown that a contract is of the **kind mentioned in the Act,** it is by legislative declaration **instantly made a contract** 'inimical to the public welfare, unlawful and a criminal conspiracy.' "

The retailer must rest assured that, so long as he waives his constitutional privilege of refusing to deal with those with whom his dealing would be suicidal, he may feel sure that he will **"live and flourish and and wax strong, * * * * cultivated in the benign atmosphere of unrestrained freedom" of the manufacturer to know his financial condition, his stocks, the prices he paid for them, and all like confidential matters, the secrecy of which is necessary to his maintenance of competition with them, and knowledge of which enables them to certainly destroy him in the struggle for business,** when a mere matter of patronizing one class of wholesalers and manufacturers, rather than another, is an expedient which avoids this result.

A literal construction is exemplified by every utterance of the court, and likewise it is made manifest that, by the terms of the statute, the courts are limited to the one inquiry, is the agreement within the terms of the statute. The citizen is denied the right to justify the agreement, within the terms of the Act, or to have any judicial review of his reasons for, or his necessity of, the agreement, or whether or not he has been justly and reasonably deprived of his property right of contract, or whether such deprivation is essential to the public welfare, and this, even

though it be in fact conducive thereto, or be not calculated to be inimical thereto.

Although the established law is that, while the determination as to what the public interests require, and as to what measures are necessary for their protection, are primarily with the legislature, its determination as to what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts (**Lawton vs. Steele,** 152 U. S., 133), the court in this case, declines all such investigation, assigning that the discretion to determine these matters is in the legislature, and to it the citizen must resort, that the legislature left nothing for the court to determine, except is "the contract of the kind mentioned in the Act."

In the case at bar, it is held that the Act prohibits every agreement within its terms, whether or not it has any necessary or direct tendency to restrain trade or restrict competition, and **even though it be not calculated** to have any such effect, though not in fact inimical to the public welfare, and though it be but a **defensive measure against unfair competition** by others, and though in fact the agreement be essential to the maintenance of trade by the parties, and that the only question the court is at liberty to pass upon is, does the agreement fall within the terms of the Act; and that an agreement **intended to hinder competition** is prohibited in terms, even though the intended hindrance be merely incidental to some legitimate action taken by the combination, with some other legitimate end to be attained. The court has advanced from the announcement of the Searles case "the only test, in determining the validity of a contract under this Act, is not what the **intent** of the parties may be, not what form the combination has taken, but what will **its probable effect be,**" to "it is unimportant to consider whether the means (contract) adopted **be calculated to be effective or not**", and "it is likewise unimportant to consider whether the means (contract) adopted **be peaceable and otherwise lawful**". This can but mean that, no matter whether the intent to restrict be the main purpose or not, if the court can say that the parties foresaw that their agreement for the accompilshment of their lawful purpose **probably** would have that result, or that they **intended** it should have such result but was not calculated to effectuate it, the agreement is "within the terms of the statute" and unlawful.

As applied and interpreted in this case, the statute is the exact equivalent of this: "if two or more persons, natural or artificial, shall, for any reason whatever, enter into and make known any agreement, in any form whatever, either express or implied, whereby they shall pledge themselves not to buy any commodity from a competitor of any one or more of such persons, the persons so agreeing shall be guilty of a criminal conspiracy, and shall be fined not less than two hundred nor more than five thousand dollars each day such agreement shall be maintained and shall, moreover, be liable to each of such competitors, who, but for such agreement, could have sold such commodity to any one of such persons so agreeing, in the penal sum of five hundred dollars and all profits which he might have made on any such sale; **provided,** that the persons so agreeing intended by such agreement to hinder such competitor in competing with any one of such persons. Whether such agreement shall hinder, or be calculated to hinder, such competitor, or for what main purpose such agreement may be made, shall not by any court be inquired of, but the mere fact of such agreement shall be conclusive evidence of such intent, however slight the hindrance, however indirect or remote the result, however incidental to some main purpose, however essential such agreement to the power of such persons to compete". That this is the effect of the ruling in this case can not be denied.

The question here presented is: May a state, under the guise of its police power, forbid agreements between tradesmen, made with the purpose to preserve their trade by so regulating their business as to maintain the most advantageous position possible to meet competition, but without restriction of the rights of others, merely because such agreement **may** incidentally, indirectly, and innocently, restrain trade to an inappreciable degree?

THE AGREEMENT,

THE REASON, NECESSITY AND JUSTIFICATION THEREOF.

The validity of the statute must be tested by the facts of the case, not by what the state court may have said were the facts, when, as in this case, the bill and answer make the case. This court is not bound by the utterances of the state court upon a question of what the pleadings show, as upon disputed questions

of fact arising from a conflict of evidence. The answer must be taken as true upon every matter of which it speaks, unless, of course, manifestly untrue. We may, therefore, examine the bill answer and by-law and thereby ascertain the main purpose, intent and effect of the agreement as if the state court had rendered no opinion.

It should be noted that the agreement held illegal provides for no division of territory, no fixation of prices, no acquisition of monopoly, no interference with contract rights, no pooling of profits, no action by others than members of the Association, no agreement with wholesalers or manufacturers, no promise from them, no collection of commissions on sales by them, no imposition of penalties upon members or others, no malicious purpose to injure, no acts of violence or tending to violence, no interference with the business relations of others, no persuasion of others than members to do or not to do any act, and competition between the members is absolutely free and unrestrained, and that the agreement restricts the rights of neither wholesalers and manufacturers or consumers, but merely asserts those of the plaintiffs in error.

The fact upon which the court remarked that the purpose of the Association was to prevent manufacturers and wholesalers from selling to consumers **"at any time, at any place,** and **at any price"** is the fact which shows that no such **main** purpose existed, and from which no such main purpose or intent can be inferred. The agreement is not to buy of manufacturers and wholesalers who sell to consumers where **retailers,** not where members do business, and the members could have no purpose to hinder competition except where **they** do business. It is true that the agreement provides for no notice except by members, but that is because there is no machinery for ascertaining the fact of a sale where members do not do business. The fact important to retailers is the **general practice** of a manufacturer or wholesaler, for, if he, as a general practice, sells to consumers where **retailers** do business, he is apt to sell to members today, and, with the knowledge of their prices, stocks, and financial condition, thus obtained, defeat them in the struggle for business tomorrow; while if his **rule** be not to sell to consumers where **retailers** do business, there is no such probability. The state court, in determining the purpose of the agreement, ignores all declaration of a lawful intent,

looks only at the declaration that the members have experienced the disastrous consequences of competition with wholesalers and manufacturers, without noting that "we cannot meet competition **with those from whom we buy,"** and thus finds the avowed purpose to hinder competition.

The gist of the opinion is that the statute is violated, if the combination be **within its literal terms.** Whether it has any effect upon the public interest, whether its effect be incidental or inevitable, whether it be in fact detrimental or beneficial to the public welfare, whether a hindrance or accentuation of competition ensue, whether the combination be to fight fair or unfair competition, whether it be a measure essential to the means of competition, are alike matters of which the court will not inquire.

The one inquiry to which the court is by the statute limited is, did the members of the Association "intend to hinder competition", or, as concretely applied, did they "intend to make competition with them inconvenient, or troublesome, or in any wise embarrassing, or less profitable, to their **competitors".** As construed, the statute prohibits an intent to hinder, **not competition,** but one's **competitors.** It prohibits disseminating information among members of the Association as to **who are their competitors,** and the adoption of a rule to buy only of those **who are not their competitors.**

In the light of the bill, answer, by-law and decision, the statute condemns an agreement between retailers of lumber to bestow their patronage upon wholesalers and manufacturers who, for perfectly good business reasons of their own, and independently of any combined action by the retailers, do not, and would not sell to consumers, rather than upon **competing** wholesalers and manufacturers, with **the main purpose, intent and effect** to place the members of the combination in a position to more effectually compete with their competitors. The justification of the statute, the court finds to be an **intent** to hinder competition, and its finding that such intent in this case exists must rest upon the bill, answer and by-laws, as must the contention that the main purpose, intent and effect are to place the retailers in a position to more effectually compete with competitors of the wholesaling and manufacturing classes. If we can show by the bill, answer and by-law that such is the main purpose, intent

and effect of the agreement, we thereby demonstrate that the intent, purpose and design condemned in this case is one collateral or incidental to some main purpose, intent or design,—intent, purpose or design, in this light, being such as may be inferred from an act which the actor might foresee would or might have a given effect, though aimed at some other effect, and actuated by some other motive.

The main purpose, intent and effect are to place the members of the Association in a position to more effectually meet competition. The "Declaration of Purpose" says, not only that "we recognize the disastrous consequences which result to the retailer from direct competition with wholesalers and manufacturers", but also "that we cannot meet competition", not from wholesalers and manufacturers, but **"from those from whom we buy,"** and the agreement is to buy, not from wholesalers and manufacturers who will agree not to sell to consumers, but **"only from manufacturers and wholesalers who do not sell to consumers"**, the answer avers: **"that it is not just and fair that they** (the defendants) **shall be oppressed and their business injured by competition"**, not from wholesalers and manufacturers, but **"from those very wholesale dealers and manufacturers from whom they have bought their stocks in trade, and from whom, in the nature of the trade, they have been compelled to buy the same"**. The answer then shows that, of about 2400 wholesalers and manufacturers in the two states, **"there are many more than enough to supply these defendants with lumber and lumber products who, for perfectly good business reasons of their own, and independently of any action on the part of the said Association, will not, and never would, sell lumber or the lumber products aforesaid to consumers"**, and "that the defendants **deny that the purpose and object of said Association was, or is, to prevent and destroy competition between retail dealers in lumber and its products, on the one hand, and wholesale dealers in, and manufacturers of, lumber and its products, on the other; and aver the truth to be that the purpose and object of said Association are to promote and foster the trade and enhance the business and legitimate interests of its members, by purchasing only from those wholesale dealers in, and manufacturers of, lumber and its products, whose business policies are more favorable to the business of said members"**. The answer further avers that the agreement merely puts man-

ufacturers and wholesalers to their election between th trade of defendants and that of consumers where retailers do business; and that **"they have a right to agree together, and let such agreement be known, that they will by preference give their custom to traders who shall so conduct their business as to allow to defendants the best opportunities for the maintainance and advancement of their useful and legitimate trade"**, and avers that "if the action and constitution have any tendency to restrain trade or restrict competition * * * * the same is the indirect effect of what defendants have a lawful right to do, **and are not the direct effects, or purposes of defendants".**

The real reason for the by-law, as evidenced by the "Declaration of Purpose", is, not that "we cannot compete with wholesalers and manufacturers", but that, "we cannot meet competition from those from whom we buy". Why cannot a retailer compete with those from whom he buys? Not simply because a wholesaler or manufacturer **can** sell at a lower price, as the state court evidently assumes. That is the smallest consideration, for they sell to consumers at a price just a slight reduction on the retailer's price, and not at what he can buy at, and not at any reduction, unless the retailer forces it.

The consideration which moves the retailers to adopt the rule in their business is that, when a manufacturer or wholesaler comes into competition with the retailer to whom he sells, he has the incalculable advantage of knowing the retailer's stock, what it cost him, whether he bought when the market was up or down, whether, if he hasn't the stock needed by the consumer, he can get it in the market, and, if so, at what cost, and in what length of time, whether or not the retailer's financial condition will enable him to give the terms desired by the customer, and, therefore, **whether or not the retailer can compete,** and, if so, at what prices he can sell, and just how much reduction, if any, will be necessary to defeat him in the struggle for the trade of the consumer. All of these advantages, the manufacturer has of the retailer to whom he sells. **They are confidential trade secrets** as between the manufacturer and his retail customer; and it is not only suicidal for the retailer to buy of the manufacturer who sells to consumers where he does business, but it is **bad faith for the manufacturer to use this information to oppress or defeat the retailer in the struggle for trade.**

These are matters of such great importance in competition, that no merchant will buy of a traveling salesman, who gives his competitor the cost price of his goods, advises whether or not he is well stocked in a given line, whether he pays cash, or buys on time, whether he meets his bills promptly, whether he is a close or liberal buyer, what lines he carries of various stocks, or any like information. The giving of any such information by a drummer to a competitor of a patron is ground for his discharge. Business men always refrain from making such information known to competitors. They are so cautious in this regard that one concern seldom has two customers for the same line in a small town, because, when the two buy from the same house, they know what each other has, and what it cost him, approximately.

These are the laws of tradesmen, than which none is better known, more fully established, or more generally adopted, **for the purpose of maintaining a position to compete and meet competition,** and of this the court takes judicial notice. This is what is meant by the averment of the answer that "such Association was formed for the purpose and with the intent only to conserve and advance their legitimate interests, and not for or with the purpose or intent to hinder or injure competition", and by the averment that it was formed for the "purpose and with the intent to promote and foster the trade and enhance the business and legitimate interests of the members * * * * * by buying only from those * * * * whose business policies are more favorable to the business of the said members". This is what is meant by the averment of the answer that "it is not fair and just that they (the members) shall be oppressed and their business injured by competition **from those very wholesalers and manufacturers from whom they have bought their stocks in trade,** and from whom, in the nature of the trade, they have been compelled to buy the same". The idea runs all through the answer, and pervades it in its entirety.

It is a strained construction which enables one to find an intent to hinder competition. So far from the main purpose and intent's being to hinder competition, its main purpose and intent are **to enable the members to more effectually compete, and to thereby get the business which the wholesalers and manufacturers would otherwise get,** any change in the policy of a manufacturer or wholesaler being but the result of any other competitive meas-

ure, merely incidental, and, to that degree, increasing competition for the custom of the retailers.

If any wholesaler or manufacturer prefers the trade of the retailer to that of consumers, and changes his policy on account of the agreement, **competition for the trade of the retailers will be increased.** If they prefer the trade of consumers to that of the retailers and redouble their efforts to sell them, **competition for the trade of the consumers will thereby be increased.** The purpose of the Association, therefore, may as justly be said to be **to increase competition for their business,** as to hinder competition for the business of consumers, for no one can weigh the benefit of the one result against the other and say which would be greater. We may, therefore, as reasonably find an intent to increase, as one to hinder, competition. A struggle for business among manufacturers is no less competition than is a like struggle between retailers and manufacturers. Competition, in any case, is no more nor less than a struggle for trade. The combination may indeed be as aptly termed one to increase competition for the trade of the members, as one to hinder competition for the trade of consumers. It may as aptly be termed one to increase and accentuate, as one to hinder, competition.

An illustration taken from the actual experience of a member will serve to make plain the necessity of not buying from those who are his competitors, and of knowing, otherwise than from a manufacturer's lips, who are his competitors: A member relates that he was asked to bid for an order about to be placed, such only as manufacturers will handle, and which the retailer could not fill from stock on hand. He made a copy of the list furnished him, sent that to the manufacturer whom he generally patronized and who claimed that he did not sell to consumers, and asked for prices. The prices quoted were $17.00 per thousand, and the retailer then offered to sell to the consumer at $18.00. Upon being offered the bill at that price, the consumer replied that he could buy at $17.75, and, upon being asked of whom, named the manufacturer who had quoted the retailer, and the latter, of course, lost the bill. It is plain that the manufacturer compared the lists sent him, one by the retailer and one by the consumer, saw that they were both from the same town, knew they were both wanting the material for the same building, knew that the retailer could not sell for less than $1.00 per thousand

profit, that he stood two chances to get the same order, if from the retailer, at $17.00, if from the consumer, at $17.75, **the higher figures absolutely without competition.** It would be utter folly to call such tactics competition. Unfair competition would be too mild a term. It was fraudulent on the part of the manufacturer, both in that he had obtained custom on the representation that he was not the retailer's competitor, and in that he had used the confidential matter, intrusted to him by the retailer, to defeat such patron. Business honor required that, in this instance at least, he should have quoted prices to but one or the other.

Another illustration from the actual experience of a member will serve to illustrate the advantage of the policy of favoring that class which favors them: The retailer was not deceived by the manufacturer in this case. An order was about to be placed for material to go into a public buliding now being erected in Yazoo City. The builder has demands which enable him to buy in quantities, from mills which sell to both retailers and consumers, and the local dealers knew they were to bid against manufacturers. The secretary named by the bill herein was the local dealer, and he, knowing that he had favored those manufacturers who do not sell to consumers, and believing that they would reciprocate, bid on the material at mill market prices, and secured the order. He then went to one of the manufacturers whom he patronized, and of the class he patronized, showed him the low prices at which he had taken the order, and said: "I have taken this order in competition with mills who sell to consumers; I favor you and your class with all my business; and I want you to sell me this bill at prices I can make a profit on". The manufacturer looked the prices over, and agreed to let the retailer have the bill so that he could make a net profit of $1.00 per thousand. Had the retailer been buying of mills who sell to consumers, he could not have bid successfully on this bill, for the mill man would have said "I can't help you", if approached, and the retailer would have been in no position to approach him. In other words, had the retailer not maintained the policy the Association stands for, he had not been a competitor for this bill. The retailer whose experience this is tells us he often reaps this advantage from this policy of business, and we judge his is no exceptional case.

Only illustrations based upon these larger orders and orders for car-load lots, or bills for a whole house can be had, because only

such orders will a manufacturer fill. In other words, they will compete only for the best and most desirable portion of the trade, small houses, fences and patch-work being left to the retailer to "live, flourish, and wax strong" on, and be "cultivated in the benign atmosphere of" serving the **"convenience** and **necessities** of the people", instead of paying heed to the cries of his own family for conveniences and necessities. Absolute and unqualified subordination of self-interest to the **theoretical** welfare of the consumer, but in fact to the end that the manufacturer may obtain the highest prices and the best of the trade, is what the decree requires of the plaintiffs in error.

It may be suggested that gathering and disseminating the information as to who competitors are, without the promise to buy only of those who are not such, would serve the purpose of the Association to avoid the disadvantages of buying from them, and that, from this promise, the intent to hinder competition may be inferred.

It is true that such inference may be drawn, but an intent to build up and increase competition for the business of the members may more reasonably be inferred from this fact. Nothing is really more naturally to be inferred, unless we are given over entirely to a desire to find an evil motive. Bearing in mind that the agreement, by the use of the language, "we are pledged to buy only of **those who do not sell** to consumers", implies that the members had in mind that there was **then** such a class with that policy of business regardless of the Association action, that the answer shows such class to be more than are required to furnish the members, that that class would naturally claim of them that their method of doing business entitled them to this favor, and that the retailer would be absolutely unable to deny that to be a fact, we see that the intent, not sinister, is far more reasonably to be inferred as the main intent of this particular feature, and far more consistent with the main feature of fostering, enhancing, and promoting the business of the members, by placing them in a position the better to compete. The fact that the agreement has no limitation as to where the manufacturers sell to consumers shows conclusively that a restriction of competition was not the object. They can have no reason for desiring to restrict competition "at any time, at any place, and at any price".

The real necessity of this feature of the agreement was due to a practice, long prevailing among manufacturers and wholesalers, of paying retailers commissions on sales to consumers, a practice which had really grown out of the fact that manufacturers and wholesalers, as well as retailers, knew that such sales were unfair competition, but which tended to prevent members from reporting the information to the secretary for dissemination. They were advised also that the practice of accepting these commissions might develop into an implied agreement with the manufacturers, certainly bringing the individual member within the prohibition of the law, possibly becoming so general as to justify the finding that it was an Association demand, and thus involving other members in trouble. This feature, in other words, was one protective of each against the possibility of an illegal practice of the others, and insuring the main object of knowing who were competitors of each.

The false assumption that all the manufacturers desire retail trade, and that, if some refrain from selling at retail, competition will be restricted, lies at the foundation of the whole case, as does also the assertion of the state court that the legislature has unrestrained power and unlimited discretion to take away from the citizen his liberty of contract, even to the extent of depriving him of his means of livelihood. Either this, or it loses sight of the fact that the decree simply takes from the retailer the most desirable portion of the trade and bestows it upon the manufacturer, and thus actually destroys the right and power of the retailer to maintain competition. The decree really destroys competition under the idea that a manufacturer's change of policy would lessen it, when in fact such a change would accentuate competition for the retailer's patronage to a degree exactly equal to the lessening thereof for the business of consumers, while such manufacturers as did change to selling to consumers exclusively would redouble their efforts to sell to them.

The Association is necessary, because in no other way can the information as to the practice of selling to consumers be obtained and disseminated among members, and in order to avoid doing a manufacturer an injustice, and in order to avoid cutting the members off from the benefit of his competition for their business. The policy of business cannot be maintained singly,

because, without the Association, there is no method of truly ascertaining who are the competitors of the retailers.

As the answers shows, members compete among themselves. In doing so, they often take orders for shipment direct to consumers where other members do business. The member at the point of destination, not knowing who was in fact the seller, seeing a car consigned by a manufacturer, notifies the secretary, who is also ignorant as to who was really the seller. Unless he asks the manufacturer who made the sale, he has no means of ascertaining the fact, for it may have been shipped by a retailer not a member, or by some member, or by a manufacturer. If, upon inquiry of the manufacturer, it develops that a retailer made the sale, that ends the matter.

If the retailer at whose town the sale was made adopts without inquiry the conclusion that the manufacturer sold the bill, when in fact some retailer did, the manufacturer is done an injustice if he is denied the patronage of that one retailer, and that one retailer cuts himself off from that much competition for his business. If the retailer opens correspondence with the manufacturer and he promises not to sell there again, the retailer and manufacturer violate the law, and such correspondence, though not amounting to an express agreement, would be held to constitute an implied one, which is equally prohibited.

Further, the retailer at whose town the manufacturer sells is not the only member competed with in the sale, for members compete with each other, while perhaps only the one nearest the consumer knows of the sale by the manufacturer, and hence the necessity for an exchange of information between the retailers. Not only this, but merely quoting prices and soliciting business are competition, even though a sale be not effected, and if a retailer sends to a manufacturer for prices on a bill, and a consumer sends for prices on a like bill, from the same community, the mill man is thus given the means of selling to the consumer at a higher price, as in the illustration above.

But the absolute necessity of the combination arises from the fact that retailers need to know the general practice of the manufacturers, and not simply what each may observe in his community, for, although a given manufacturer may never have sold in Yazoo City, for instance, if his general practice is to sell

to consumers and that fact is not known to the retailer there, it is very likely that he may fill that retailer's yard this week, and take the cream of the trade from him next. Or, if he is merely quoting prices with the knowledge of those the retailer paid, he has that advantage of both the retailer and the consumer, as shown above.

Moreover, the simple word of tradesmen cannot, as a rule, be relied upon, and the retailer can no more be expected to act upon what the manufacturer says is his practice in this respect, than the manufacturer can be expected to act upon the word of the retailer in respect of his financial standing, without inquiry elsewhere. The manufacturer, as a creditor, may inquire of a retailer as to such matters, and has a right to, but he also inquires of the commercial agencies. Likewise the retailer may inquire of the manufacturer as to what his practice with reference to selling to consumers is, and he has the right to, but he should not be denied the right to verify the information given. He cannot take an agreement from the manufacturer, for that would certainly violate the statute.

The member's experience related above illustrates this statement, and we are informed that some manufacturers advertise in the lumber trade journals that they sell only to retailers, but that many of them who so advertise sell right along to consumers where their retailing customers do business. This is a common practice, which can but be characterized as fraudulent, and against which the agreement is in part intended to guard, but to which the retailers must submit, "tied hand and foot" by the decree.

As the law stands interpreted, a single retailer cannot bind a manufacturer from whom he buys not to sell against him while in possession of his trade secrets and the advantage that gives the manufacturer, nor can he inform himself as to the manufacturer's general practice, so as to avoid giving him that advantage. In other words, the retailers must buy of manufacturers and wholesalers, and the law prohibits them from collectively gathering the information and adopting a policy of business absolutely essential to their existence, not because they restrict competition or restrain trade, or because the agreement is calculated to do either, or unlawful, or unfair, or unjust, or detrimental to the public welfare, or otherwise wrongful, but because "within the terms of a section of the Act", which prohibits an intent to hinder com-

petition, although such intent be merely collateral to some main intent, perfectly lawful, and essential to the maintenance of competition. **To prohibit the Association is to place the retailers at the mercy of those from whom they buy,** who, of course, are manufacturers and wholesalers, and to virtually turn over to them the best portion of the trade which institutionally belongs to the retailing class, at the highest price possible to the consumer. If such a law is sustained, then the protection of the Fifth and Fourteenth Amendments, as against **so-called** anti-trust Acts, is but an iridescent dream, for, under the cloak of that magic compound, there is no limit to legislative restriction of the liberty of contract, but this really is what the state court decides in this case, when it says that it is immaterial to inquire whether the agreement is calculated to restrict trade, for no excuse, other than to prevent such effect has ever been suggested as the basis of such legislation. Unless the agreement be calculated to restrict, its prohibition is unnecessary, unreasonable, arbitrary, and a meddlesome interference with the civil liberty of the citizen to make "those contracts which may seem to him" best for the promotion of his interest and welfare, while it serves no public purpose whatever.

Wherein lies the wrong of this agreement? Certainly not in ascertaining who are a member's competitors, for every business man **must** be alert to know this. Certainly not in refusing to buy of a competitor, for every business man knows the contrary policy would be suicidal. Certainly not in addressing the inquiry to the manufacturer, for that is intended to avoid unjustly refusing him patronage, or denying the members the benefit of his competition for their trade. Certainly not in the mere fact of combination, for that is essential to ascertaining the facts with reference to what is the custom of the manufacturer, instead of taking his word, any other means of dealing with him and the adoption of the policy by an individual would amount to an implied agreement that the manufacturer should not compete with the retailer. Certainly the inquiry cannot be said to be an effort to get the manufacturer to quit selling consumers, for, if the sale inquired of was made, the members require and will accept no agreement that he shall quit selling them, and they quit buying of him, just what he, it may be inferred from the notoriety and publicity of the agreement, contemplated when he made the sale,

whether he be of the class who openly and honestly make special efforts to sell to consumers, or of the class who advertise one thing and practice another.

Boiled down, the agreement, then, **is not to buy of competitors, or to buy only of those who are not competitors.** To punish such refusal is to take from the retailer his right to place himself in a more advantageous position to compete, for no other assignable reason than that a consumer shall have the mere possibility, or probability, of having the benefit of greater competition for his patronage. On what is doubtless the theory of the state court, it is nothing more nor less than taking directly from the retailer and giving to the consumer. It is, in fact, taking from the retailer the right to increase competition for his patronage, to the end, ostensibly, that the consumer may possibly, or probably, enjoy more competition for his, but really taking from the retailer and bestowing upon the manufacturer and wholesaler the better and more desirable portion of the retail trade. It is not securing to the public the benefit of competition, but is taking such benefit from one class and bestowing it upon another; really taking from one class of traders and bestowing upon another the business, under established usages, rightfully belonging to the class deprived; **all under the guise** of prohibiting an intent to hinder competition. We, therefore, have before us a statute imposing a fine of $5,000.00 per day upon a class of tradesmen, because they refuse to follow the suicidal policy of buying of their **most formidable competitors.** Worse still, if possible, the competitors refused patronage are given a right of action, for a $500.00 penalty and all profits they might make on such patronage, against the class refusing to deal with them.

Competition by the manufacturer against the retailer to whom he sells is unfair competition. So generally is this fact recognized, manufacturers and wholesalers, as shown by the answer, and as the court judicially knows, have, in every line of trade and commerce, long generally observed the practice of not selling to consumers where their retail customers do business. This custom has become institutional in its character, and the decree is revolutionary.

The state court saw this, but attempted to obviate the point by saying that the intent of the Association is to destroy all competition by wholesalers "at any time, at any place, at any

price", whether fair or unfair, the basis of which assertion by the court shows that no such intent can be inferred from the agreement, as shown above. But the court doesn't stop here, for it says "the purpose of the legislature is to require all persons to look to the law to declare and define what shall be unfair competition, rather than permit the courts or the parties in itnerest so to do", and to appeal to it for that paternity of government balefully pervading the legislative atmosphere of today.

The retailer must, therefore, struggle alone to resist the unfair competition of his stronger rival in trade. Not only so, but he must give such stronger rival the benefit of his **trade secrets** in the struggle, must let him know the prices he pays, his financial condition, the stock he carries, &c. Though "the very existence of the retailer depends upon such combinations, this appeal is one to be made to the legislature". Not to his own efforts but to the legislature, which, not only must prevent a restriction of competition, but **regulate** competition as well. Not another court, within the realm of the whole civilized world, has ever condemned the action; not another legislative body has ever assumed to say that a citizen, or an association of citizens, may not refuse business relations with whomsoever he or they choose; but the Mississippi Legislature forbids what all courts have held **"a legitimate protective and defensive measure".** The courts of Indiana, 23 L. R. A. 588, and Georgia, 57 L. R. A., 547, Nebraska, 5 L. R. A., (n s), 136, Tennessee, 46 L. R. A., 561, the decisions the Mississippi court had in mind when writing the opinion, by necessary inference, maintain the legality of this Association and flatly announce that **"it is not the mere passive let alone policy of refusing all business intercourse and fellowship, which renders the combined action illegal". Bohn Mfg. Co. vs. Hollis,** 21 L. R. A., 337, announces the same proposition, as do all the courts which have expressed themselves. **Anderson vs. United States,** 171 U. S., 604, and **Montague vs. Lowry,** 193 U. S., 38, maintain and announce the proposition under the Sherman Act.

It may not be sound to say that what one may "lawfully" do, any number may combine to do. We do not attach any importance to the proposition, which seems to have originated with the Bohn case, **supra,** in which the court took occasion to say that the remark was called for, not by the decision, but the great stress counsel for complainant had laid upon the number of the combi-

nation. That case went too far, but this proposition is in no wise demonstrated to be false by the illustrations given in the Bailey case. It is not lawful to restrict competition or restrain trade, and both results were attained and aimed at in the illustrations given. **One man cannot, legally speaking, do either.** One man may **lessen** either, by quitting the pursuit of a given business; a dozen men, after consulting and advising among themselves as to the prospect in the same line, may quit the same business, and thereby **lessen** competition, but in neither case is competition, **legally speaking,** restricted, or trade restrained. All of the so-called illustration of the unsoundness of the position we have seen may be disposed of by like analysis.

So, it is lawful for one man to refuse to have business intercourse with another, because such intercourse would be detrimental to his business interests. It is his inherent right to do so,—and it must be lawful for any number to join with him, and him with them, in refusing business relations with others, **business intercourse with whom would alike be detrimental to the business of each of the combining class, and to each of whom the combination would be essential to the avoidance of the detrimental effect resulting from such intercourse.** Each has the inherent right, of which no court or legislature can deprive him, to avoid such detrimental effect, and each has a like right to assist the others in avoiding the same, by disseminating the information necessary to avoid it. To say that two shall not combine to accomplish their lawful object, by lawful means, when combination is essential to the attainment thereof, is to deny to each the inherent and constitutionally protected right to attain the object. It is not merely requiring of the two that they shall so exercise their individual rights as not to injure others in the exercise of their correlative ones,—the only basis on which the police power of limiting the liberty of the citizen's right of contract can rest,—it is taking from each his property right to associate for his common good, for the benefit of other individuals, ostensibly, consumers, but, in fact, manufacturers and wholesalers. It proves nothing to assert that the manufacturer must have the privilege of selling to the consumer, or that the consumer must be allowed to buy of the manufacturer, except that the retailer must be allowed the correlative right of buying of whom and selling to whom he can make contracts with, so long as he exercises such rights in a way

which best serves his purposes, and wantonly injures no others. All the retailer asks here is to be allowed to buy his stocks in such way as he shall not be compelled to place it in the power of the manufacturer to take advantage of the confidential matters connected with his business to defeat him in a struggle each has a right to maintain, and which the consumer has a right to expect to be maintained. In other words, no one of the three classes can expect either of the other classes to surrender for his benefit, and this is not asked by the retailer, and should not be required of him by the others.

THE AGREEMENT DOES NOT RESTRAIN TRADE, RESTRICT COMPETITION OR CREATE MONOPOLY.

The technical difference between restraint of trade and restriction of competition is more fanciful than real, has been disregarded by all the courts, and is of interest only from an historical point of origin, for the reason that whatever restrains trade, in equal degree, restricts competition, the life of it, and no distinction between the two is here maintained, following the courts, this and the Mississippi courts included. As to what that distinction is and what regard the courts have paid to it, see Judge Freeman's note, 74 Am. St. Rpts., 260.

The state court necessarily held that the agreement here involved does not restrain trade or restrict competition, else it would have held that it was within the prohibition of sub-section (a), instead of sub-section (d), of the Act, and would not have expressed the undoubtedly extreme view that even an agreement not calculated to be effective was within the latter. All courts would have held that the agreement was neither a restraint of trade, nor a restriction of competition, but, had they not, this court, upon this question of general law, would be guided by its independent judgment, and its own ruling, about to be cited, would control.

For legislative interference with the liberty of contract protected by the Fourteenth Amendment, by so-called anti-trust acts, there is absolutely no basis whatever, except to prevent a restraint of trade, a restriction of competition, or a monopoly. They have no other imaginable relation to the public welfare. No other reason has ever been assigned for their enactment.

Upon any basis other than one of these, they are a mere meddlesome interference with the liberty of the citizen to deal with and refuse to deal with whomsoever he will, and to conduct his business "in such way as may seem to him best". On any other basis, they possess every element of an unconstitutional enactment, as they are unreasonable, unjust, unnecessary, arbitrary, and conflict with natural right. **Lawton vs. Steele, supra.**

In our judgment, this court has, therefore, decided that from which the unconstitutionality of this Act must necessarily follow, in the Anderson case, 171, U. S., 604, under the Sherman Act, which this court, in the Trans-Missouri, the Joint-Traffic, the Addyston Pipe Line and the Northern Securities cases, held to prohibit every agreement, the necessary and direct effect of which was to restrain trade, or create monopoly, or restrict competition. It held the agreement legal, and it could not have done so, had it not held it did not have any such effect, in the light of the first two named cases, the later of which was decided at the same sitting of the court.

There, the agreement was between members of a voluntary association of live-stock merchants that they would not deal with a certain class of their competitors, or with commission merchants who did. Here, the agreement is between the members of a voluntary association of lumber merchants not to buy of a certain class of their competitors, or of commission men through whom they sell. There, the market was a narrow one; here, it is a broad one and the possibility of restriction is comparatively imperceptible. There, the members charged with crime made efforts to get the commission merchants not to sell to their competitors; here, there is no interference with another's business relations, or prospective business relations. There, outsiders were interfered with, both commission merchants and yard traders who were not members; here, only members, joining freely, withdrawing freely, and agreeing freely, are dealt with. There, commission merchants were importuned and threatened; here, they know, from publicity given the agreement, of the policy of the members, are asked if they made a given sale, and let alone if they did. There, if the yard trader chose to, he could join the association; here, if the manufacturer chooses to, he may devote his energies to selling to consumers. There, others than members of the association on trial, the yard traders could deal with; here, others

than members may be dealt with, both at wholesale and retail,—less than one-third of the retailers and no consumers refusing patronage. There, the object and effect were to regulate the business of members; here, the object and effect are the same. There, members were in competition with each other, the association did no business; the same is true in this case.

The remarks of the court to the effect that it saw no purpose to restrain trade were merely by the way, and not grounds of decision, for it did not mean to say to the Joint-Traffic Association, at that time sitting, that its purpose to fix reasonable prices, those the commission had fixed, and that it had in fact lowered prices, did not save its agreement from illegality, because **it in fact did restrain trade**; and to Anderson et al., that their purpose not to restrain trade saved theirs, although their agreement in fact **did** restrain it. The ground of the Joint-Traffic decision was that its agreement did restrain trade, and was, **for that reason,** illegal; and the ground of the Anderson decision was that the agreement did not restrain trade, and was, **for that reason,** legal.

Of the agreement, this court said:

"There is really no dispute in regard to the facts in the case. Although the bill contains various allegations with regard to conspiracies, agreements, and combinations in restraint of trade and in violation of the federal statute, yet there is no evidence of any act on the part of the defendants preventing access to the yards or preventing purchases or sales of cattle by anyone, other than as such sales may be prevented by the mere refusal on the part of the defendants as 'yard traders' to do business with those who were also yard traders, but are not members of the exchange, or with commission merchants, where such commission merchants themselves do business with 'yard traders' who are not members of the exchange. In other words, there is no evidence, and really no charge against the defendants that they have done anything other than to form this exchange and to adopt and enforce the rules mentioned above, and the question is whether by their adoption and by peacefully carrying them out without threats and without violence, but by the mere refusal to do business with those who will not respect their rules, there is a violation of the federal statute. * * * *

"It will be remembered that the association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of cattle, while the association itself has nothing

whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. * *

"This association does not meddle with prices and itself does no business. * * * * The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by the defendants. There is no tendency as a result of the rule, directly or indirectly, to restrict the competition among the defendants for the class of cattle dealt in by them. * * * *

"The agreement lacks, too, every ingredient of a monopoly. Everyone can become a member of the association, and the natural desire of each member to do as much business as he could would not be in the least diminished by reason of membership, while the business done would be still the individual and private business of each member and each would be in direct and immediate competition with each and all of the other members. If all engaged in the business were to become members of the association, yet, as the association itself does no business, it can and does monopolize none. * * * It has no tendency, so far as can be gathered from its object or from the language of its rules and regulations, to limit the extent of the demand for cattle or to limit the number of cattle marketed or to limit or reduce their price or to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market. While in case all yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct, necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so effect interstate commerce, is entirely too remote and fanciful to be accepted as valid."

Only a few illustrations are necessary to demonstrate that the court was right in its holding that the agreement of the live-stock traders was **not** in restraint of trade, also that the one here involved is not; and that, therefore, the intent the statute is here held to prohibit is one which may be inferred, and which is here conclusively inferred, from an act, the actors may be said to have merely foreseen would, or probably would, or might, result from the agreement, mainly and principally aimed at some other object perfectly legal and lawful, and which result was not the one for the sake of which the agreement was formed. A mixed

motive of desire to hinder competition and to place the members in a better position to compete is the very utmost that can possibly be said of this agreement; and, on the record, it must be held that the latter is the main purpose and intent. The agreement and the answer's averments make this case, while the answer denies the intent the decision rests upon.

But, to the illustrations: Suppose all the retailers in the United States were in this Association, adopting the policy of business complained of, and that all manufacturers and wholesalers, because thereof, confined their sales to retailers, would competition be lessened? Would not they who changed their policy to that of selling only to retailers increase competition for their trade in degree exactly equal to the lessening thereof for the trade of consumers? Is competition for the trade of retailers any the less competition than is competition for the trade of consumers? Would not that competition inure to the benefit of consumers, proportionately to the benefit thereof to retailers? Competition as a whole must be considered, unless, of course, we come to the conclusion that only competition for the benefit of consumers is desirable and aimed to be secured. That conclusion, however, is repugnant to every idea upon which is based the supposed benefit arising therefrom. Competition is a struggle, a free struggle, for trade. Is it secured by saying to one class that they shall surrender, to the end that another class, either manufacturers or consumers, shall have that benefit? Is it accomplished by saying to one class "you shall not so manage your business as to be best able to maintain the struggle?" Can the legislature say this? In this illustration, no account is taken of manufacturers who would change to the policy of selling to consumers only, who would increase competition for their trade in degree equal to that of retailers would be decreased. In no event can competition be lessened. "Driving out of business" and other like meaningless assertions, add nothing to the result of the agreement. No such results are accomplished.

There can be no denial that the statute operates alike upon a combination of two against two, two against a million, and a million against a million. There can be no difference, except in degree of punishment within the discretion of the court, and two, with stocks of goods amounting to $200.00 each, can just as completely violate the law as a thousand, with a million dollar stock

each. The statute covers alike combinations of "two or more". **Canning Co., vs. Joulian, supra; Cleland vs. Anderson,** 5 L. R. A. (n s) 136, the Nebraska case referred to by the court in this case.

Therefore, under the ruling of the court, the statute condemns an agreement between two retailers that they would buy only of two wholesalers,—if there were only two within the two states who did not compete with them,—although the two retailers continue to compete with each other, and with the other two hundred and fifty-five retailers, and with the twenty-three hundred ninety-eight other wholesalers and manufacturers.

If two retail grocers, doing business in the village of Anding, midway between Jackson and Yazoo City, Mississippi, finding that the Jackson wholesaler sells to consumers at Anding, and that the Yazoo City wholesaler does not, after consultation and agreement change their business to the Yazoo City man, because his policy is more favorable to their interests, the two retailers have formed a trust and combine; and, if the Yazoo City wholesaler, as a means of competition with the Jackson man, calls the attention of the two retailers to the difference between his methods and those of the Jackson man and appeals to them to favor him because he favors them, and they accede, the Yazoo City wholesaler has entered the trust and combine with the Anding retailers, although he makes no change in his methods of business, but continues his settled policy of dealing only with retailers.

There are two retail lumber yards in Jackson: the White Lumber Co., a manufacturer, keeps there a solicitor for all desirable business, refusing all small orders, while Enochs Brothers, manufacturers there, sell exclusively to dealers. If the two retailers agree that they will buy of Enochs Brothers, and not of the White Lumber Company, they form a trust and combine; while, if Enochs Brothers, as a means of competition with White, say to the retailers: "we have never sold to consumers, we do not want their trade, are not prepared to handle it, and are not going to sell them, you ought to patronize us for this reason", and the retailers resolve to buy of them, Enochs Brothers have entered the trust and combine with the two retailers, who continue to compete with all wholesalers and manufacturers, who haven't the same policy Enochs Brothers have, and with each other, and Enochs Brothers continue to compete with all wholesalers and

manufacturers, who have the same policy they maintain, and, should any wholesaler change his policy to that of Enochs Brothers, the latter's competition is thereby increased.

There are five retail grocerymen in Yazoo City and two wholesalers of groceries. One of the latter sells to consumers, and the other does not. The retailers get together, agree that they will patronize only the one selling strictly at wholesale. They have formed a trust and combine, even though the policy of none of the wholesalers is changed.

If two retailers, having their business raided by a wholesaler of whom they have been buying for years, confer and say to him: "we have patronized you for years, you know our stocks, our capital, our means for obtaining goods, what our goods cost us and have every advantage of us in competition; proceed to compete with us, we do not ask you to cease doing so, but we will never buy another dollar's worth of goods of you so long as you continue your present policy; we can buy of others, and will do so"; such wholesaler proceeds to make special efforts to sell consumers within the village of the two retailers, ruins them, drives them out of business; the two retailers must then be subjected to the heavy penalties imposed by the statute **because they intended to so struggle, so compete, with the wholesaler as to hinder him in competing with them,** although the result was that competition was thereby accentuated.

Take this case, not improbably arising at any time, and which often does arise: In a given town there are three independent retailers, usually competing among themselves; a large order is about to be placed there; no one of the retailers can command the means to purchase the material with which to fill it; there are only two mills within the state which can fill it within the time limited; the three retailers combine their capital, buy the stocks of both mills, or one-half of each, so that neither mill can compete with them for the order. The three retailers have formed a trust and combine, because **they intended to hinder their competitors,** and fall squarely within the condemnation of the decision in this case. Yet, had there been no combination, the retailers could not have competed; had they not resorted to the strategem of buying some or all of the stocks of each mill, they could not have competed. **Their main and immediate purpose,**

their chief intent and design, were to advance their own interests by getting the business; but, in as much as they intended, indirectly and incidentally, to hinder competition, they have formed a trust and combine and are subjected to a penalty of $5,000.00 per day, and to an action for the penalty of $500.00 at the suit of their competitiors hindered.

Suppose that of the 2400 manufacturers within the two states, 1200 maintain the policy of not selling to consumers; the retailers have no association, but the 1200 manufacturers have, and jointly advertise that their policy is that of selling to retailers **only,** that they think the retailers ought by preference to give them their trade, and that, if they who depend upon and favor the retailers, are not given the preference by the latter, they will be compelled to, and will, bid for the trade of the consumer. The manufacturers have formed a trust and combine, though not one retailer may have changed his policy, for they thereby intend to hinder their manufacturing competitors, just as the retailers' association intend to hinder their **manufacturing** competitors.

The agreement does not **even lessen** the amount of trade in lumber, nor does it **lessen** competition in fact; because the amount of lumber sold is not lessened by any possible change of policy on the part of manufacturers, while any such change will increase competition for the trade of the retailers to a degree exactly equal to the lessening thereof for the trade of consumers. Increasing competition for the trade of the consumer will as probably ensue from the action of the members. No one can say the trade of which will be preferred by the manufacturers and wholesalers selling to both retailer and consumer.

But we do not wish to be understood as arguing that the plaintiffs in error were not at all desirous that manufacturers and wholesalers should not sell to consumers in competition with them, or that they did not anticipate that the agreement might cause some to change to the policy, already maintained by others, of selling only at wholesale, and also that it might result in causing those already maintaining that policy, to continue the same. The point we stress is that such is not the main object, or the necessary result, of the agreement, but that its main object and chief effect are to place the members in a position to more effectually compete, with only the possibility of such incidental effect.

Nor do we wish to be understood as conceding that the legislature may prohibit the agreement were the change of policy on the part of the manufacturers certain to result. The record shows that the retailers cannot compete with those **"from whom they buy"**, that they must buy of wholesalers and manufacturers, and we maintain that, if the retailers **knew** that all of their manufacturing competitors would certainly change, the retailers, nevertheless, have the right to refuse their patronage to the manufacturers who continue to be their competitors. We maintain that, when it comes to a question of who shall have the trade of the consumer, the manufacturer or the retailer, the legislature cannot say to the retailer that **he** shall surrender, and that is what, under the pleadings and decree in this case, it has said. It did not, according to the state court, stop there, but it went further and said that the retailer shall surrender his right to trade with whom he pleases, lest the manufacturer may be hindered in his equal right to do the same thing.

And we maintain that the legislature cannot deny the right of the retailers to associate and lend each the other his aid in the struggle for business. To deny the right to associate is to deny the right to survive in the struggle. We do not believe the legislature could prohibit the seventy-seven from employing the same agent to buy all their lumber, to the best advantage in the open market, and instruct him to buy of no man who will be their competitor. To prohibit their employing the same purchasing agent, we cannot think would be tolerated by this court under the Fourteenth Amendment, and we think it practically so said in the Joint-Traffic case. Yet they are here forbidden to employ a common agent to ascertain **who are their competitors,** in order that they might not place their heads upon the block for them.

Suppose the seventy-seven defendants were to determine to engage a common purchasing agent for the reason that the smaller buyers could thus get the benefit of greater competition for their business, and for the reason that the larger buyers could thus obtain competition in greater degree for theirs, could the legislature prohibit that association? We think clearly not. We think it equally clear that it could not prohibit instructions to the common agent to buy only of non-competing manufacturers, notwithstanding such instructions should cause **all** manufacturers to choose their trade to that of the consumers. Yet, the seventy-

seven are forbidden to have a common agent to advise them who their competitors are, because they will adopt that rule upon being so advised.

But the constitutionality of the Act is not to be tested alone by what has been done under it, what may be is equally the test, 152, U. S., 170, and the number involved is immaterial; so take this case: Suppose two retailers employ a common agent and sent him out to buy at the lowest prices obtainable, but with instructions by both employers, given by each in the presence of the other, and after agreement upon the policy, to buy only of non-competitors, can the legislature punish that agreement by fine of $5000.00 and subject the two retailers to recovery by an indefinite number of manufacturers who are denied the right to compete for their business? It shocks all legal conception of what are the inalienable and fundamental rights of an American to contemplate upholding such legislation, yet that is just what is before this court

THE STATUTE, AS CONSTRUED, AIDS, PROMOTES AND FOSTERS MONOPOLY.

Retailers are a class of tradesmen which have become institutional with us, and are essentially different from wholesalers and manufacturers as another class. In the infancy of commerce, **as a necessity to manufacturers and wholesalers,** the retailing class were fostered by them, and they thus, in a large measure, became institutional; but the facilities for transportation have now reversed the situation, and the wholesaling and manufacturing classes are reaching out for the trade of consumers, advancing as these facilities increase, until they threaten the very existence of the small dealer in every avenue of trade. Slowly, but surely, he must go, unless the tide changes; and his displacement will be, not only to his detriment, but that of the consumer also. They are the middle men, the ruin of whom has been, and is, the great cry against the Standard Oil Company, which no one denies has increased the production, facilitated the handling, improved the product, and reduced the price, of oil, but which has left in its wake the destruction of the small dealer and producer.

This result of the great improvements wrought by the Standard Oil Company, the destruction of the small dealer, is one

which anti-monopoly statutes are mainly intended to prevent. That object is one of the main constitutional bases of any such legislation. Though "business and trading combinations may temporarily, or even permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose, * * * * trade and commerce may, nevertheless, be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to re-adjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in would be dearly paid for by the ruin of such a class". Trans-Missouri case, 166 U. S., at p. 323.

But no argument is necessary to show that retailers are beneficial to society, or that their destruction would be detrimental thereto, or that it was the main purpose of anti-monopoly statutes to prevent their destruction and the consequent monopoly, to the ultimate detriment of the consumer also. It cannot be denied that the effort of the manufacturers and wholesalers to reach the consumer and eliminate the retailer, in so far as they may be successful, tends to monopoly. It cannot be denied that the agreement here complained of "lacks, too, every element of a monopoly" **Anderson vs. U. S.,** 171 U. S., 604. It must necessarily, therefore, be found that the struggle of the retailers to stay in the field of competition is in keeping with the spirit and purpose of the anti-monopoly statutes, and in keeping with the spirit and purpose of their constitutional basis.

In this struggle for existence, the instant Association has not fixed prices, divided territory, or entered into any agreement stifling competition among themselves, nor have they demanded or solicited any agreement with manufacturers and wholesalers. They simply, as have legislatures, found that their existence is threatened by monopolistic tendencies and practices of a certain class of manufacturers and wholesalers, and resolved that they would give their support to that class of manufacturers and wholesalers whose practices did not tend to their destruction, with the determination to do all they can to maintain the institutional lines of trade and commerce, in the maintenance of which they are directly and vitally interested. Not that wholesalers and manufacturers may be destroyed, or competition restricted,

but that they may live, they determined to encourage competition for their business, and place themselves in the best position possible to compete for the business of the consumer. Instead of lying supinely by and waiting for the government to prevent their destruction, they, by association, attempt to help themselves, but in no way violate the spirit of the constitutional grounds upon which anti-monopoly statutes rest, and without restriction of the rights of the manufacturer, wholesaler or consumer. They are acting upon the so-called "first law of nature", self-preservation.

Now, the statute of the state of Mississippi has been so construed,—and that construction, though erroneous, is binding upon this court in testing its constitutionality,—as that the only constitutional purpose and effect of anti-monopoly statutes have been entirely thwarted, and the Mississippi Act has been made to serve the purpose and effect of promoting and fostering monopolistic tendencies, instead of preventing the same. This must be true, because the construction placed upon the Act actually forbids the retailers to ascertain who are their competitors, and, having done so, to trade with and build up those who are not,—which can be nothing less than compelling them to trade with and build up those who threaten their destruction, and placing them at the mercy of that class. The statute, as construed, necessarily and inevitably builds up and fosters monopoly in its ultimate result, under the guise of preventing it.

The state court says, in effect, that the apprehension of such result is groundless, as shown by the fact that retailers have, for a long period, survived, and concludes that they will continue to do so. If this be true, why was the anti-monopoly legislation necessary at all? It was the apprehension of this result that caused the legislation. If the prevention of this result were not the purpose of such legislation, it would not be within the police power of the state to pass it, it would be arbitrary and tyrannical. It is true that, in a measure, retailers have withstood the monopolistic tendencies and efforts of wholesalers and manufacturers, but the situation must be examined in the light of the present and the recent past. So fast have trade and its agencies developed, so effective have been the efforts of large corporations and combinations, that the comparative security felt by the small dealer in the remote past no longer exists, and hence the necessity of

anti-trust enactments, and the utter folly of expecting that the retailer must not change his policy. Once, he was fostered by all manufacturers and wholesalers, now, he is threatened by a large class of them, and he must not, he can not, be required to passively submit to his destruction, though he may finally be compelled to submit.

The desire and efforts of the retailers here complained of are not the destruction of wholesalers and manufacturers, or the restriction of competition for the trade of consumers, but their own self-preservation,—not that manufacturers and wholesalers may die, or that consumers be denied the benefit of competition, but that they, the retailers, may live and remain in the field of competition. The agreement is not restrictive of the right of manufacturers and wholesalers or of consumers, but is merely assertive of the right of the retailers. Such desire and effort but result in the retailers' protecting their own trade secrets, which are their means of competition. That is the immediate basis of their refusal to buy of their competitors, the ultimate basis being their own preservation. Permitting less of retailers, is requiring complete subordination of self-interest to the interest of others, and this, the government cannot require, whether in the interest of consumers, wholesalers, or manufacturers.

Rightly construed, the agreement complained of is beneficial to society, is promotive of competition, is against monopoly, and is in aid of the main purpose and spirit of the constitutional basis of anti-monopoly enactments. There is nothing in the agreement inimical to the public welfare; the statute, as construed, is wholly an unjustifiable restriction upon the liberty of the citizen, and deprives one class of their property and bestows it upon another, not only without due process of law, but in positive defiance thereof. It is the irony of the situation, as made by the Supreme Court of Mississippi, that a statute intended to prevent monopolies is so construed as to foster them and destroy the business of those which it was its purpose to protect and preserve.

THE INTENT, PURPOSE AND DESIGN REALLY PROHIBITED HERE.

Every act done by a trader for the purpose of diverting trade to himself, for the purpose of obtaining it in a struggle with another is an act **intentionally** done, and is **intended** to **hinder** his competitor; and, in so far as it is successful, does hinder his competitor, but to hold such act wrongful and illegal is to stifle competition completely.

We have now seen that the statute is sweeping in language, and is to be construed as prohibiting **every** agreement within its terms, regardless of all consequences, and though in fact a reasonable, fair, just and necessary one, and though in no sense detrimental to the public welfare; that the agreement here made is one simply to buy only of those it is the best interest of the members to buy of; that any hindrance of competition is merely incidental to that competitive measure, not its direct or necessary result; that the agreement has no element of an unlawful contract at common law; that it is one long regarded by the law as permissible; that tradesmen in every line of commerce and manufacture have immemorially done that which plaintiffs in error require as a condition precedent to the right to compete for their business; that the main purpose of the agreement is to place the members in a position to compete; that the combination is essential to enable the members to follow the competitive measure; that the reason for the agreement is that the members cannot compete with those from whom they buy; that tradesmen in every business have the rule not to buy of their competitors; that any change of policy by manufacturers and wholesalers will increase competition for the business of members to a degree exactly equal to the lessening thereof for the trade of consumers; that the intent of the members may as aptly be found to be one to increase, as one to hinder, competition; that, at most, the agreement can be only to hinder competitors; that competition by manufacturers and wholesalers with those to whom they sell is unfair, unjust, and a violation of the immemorial usage of their class of tradesmen; that the intent prohibited by the statute is conclusively presumed from an agreement, which is not even calculated to accomplish the prohibited result, and though perfectly consistent with other unquestionably lawful motives; and

that the particular agreement here condemned does not restrict competition, restrain trade, or tend to such result.

The intent, purpose or design which the statute is held to condemn, it must therefore be apparent, need not be some **main intent, purpose** or **design,** need not be the **object sought, or the end to be attained, the end for the sake of which the act is done,** but it need merely be such intent, purpose or design as may be inferred from an act which the actors foresee will, or probably will, result in a restriction of competition, but, in point of fact, be only incidental to some other **main** result sought, or a mere means of accomplishing some other object; for we have seen that the **main** intent, purpose, or design, the **main** object, or result sought to be attained, is that of placing the members in a position the better to compete with manufacturers, with, it may as reasonably be said, the incidental result of increasing competition for the custom of the members, as with the incidental result of restricting, or increasing, it for that of the consumers; and, it seems incredible but it is true, the statute condemns such inferred intent, even though the means adopted be not **calculated** to effectuate the same, but be ever so well adapted to effectuate the main end and legal purpose aimed at.

The state court did not say this in so many words, **but it deliberately so held.** It said: "It is urged that it must appear certain that the means adopted by the retailer will be effective, and that, as a necessary result, competition will be stifled, and the freedom of trade restrained", but, "under our statute, which provides that a combination 'intended to hinder competition * * * shall be a criminal conspiracy' it is unimportant to consider whether the means adopted are calculated to be effective or not". It was driven, by the force of the bill, answer and by-law, and the arguments and illustrations here made, to this extreme utterance. It was made plain in argument that the Association did not restrict competition in fact; that it was essential to the maintenance of competition by the members; that enabling members to compete was its main purpose. It could rest the decision only on this construction of the statute.

It had to hold this, because the answer denied that its purpose and object were to hinder competition, and averred the main purpose and object to be to enhance and foster the business of

the members, and not to restrict competition, assigning, as a reason why the action was necessary, that they "cannot compete with those from whom they", and that "it is not just and fair that they shall be oppressed by competition * * * * from those very wholesalers and manufacturers from whom they have bought their stock in trade", there being many more manufacturers and wholesalers than are required to supply them, who, independently of the Association action complained of, do not, and never would, sell to consumers.

So, as to the utterance that the court was not at liberty to inquire whether in fact the agreement be inimical to the public welfare, the legislature having declared that it was. No argument is needed to show that the success of the retailer is essential to the public welfare; and it but needs that the court's attention be called to the disadvantages he labors under in competing with those from whom he buys, in order that it be seen he cannot succeed in competition with them.

It had to announce that, if the agreement "come within the terms of any section of the statute", or be "of the kind mentioned in the Act", the offense is complete, and there is much "sticking in the letter" to bring it "within the terms", if indeed that has been done, which we doubt, because hindering competitors, which is the utmost the Association may possibly be said to intend, even incidentally, is not hindering competition, it is, rather, **competing.**

The court had to hold that, though the retailer might be destroyed by competition from those from whom he buys, he must look to the legislature, and not to his own efforts. It had to hold that, though it be unfair, for the manufacturer, competing with him, to use the advantage of the confidential relation to the retailer, the retailer must submit to such unfair competition.

The court had to hold that no business expediency, no self protective or defensive measures would justify action coming within the strict letter of the law, in order to condemn this Association; for the answer sets up, and the court judicially takes notice of, the fact that the action condemned is absolutely essential to the efficient performance, by retailers, an institutional class of traders, of the duties they are expected to perform in the pro-

cesses of collecting and distributing commodities in trade, serving the public needs, and ministering to the public welfare.

In order to reach the court's conclusion, it had to hold, whether consciously or not, that the retailers must submit to the raiding of their business by competition with those in possession of their trade secrets, and must place them in possession thereof, to the end that consumers might have more competition for their custom, or to the end that manufacturers might, with greater facility and certainty, take the trade from retailers, at as high prices as possible to consumers, for that is what they do, if they know the prices paid by the retailer.

Contemplate the radical statute: Two or more persons shall not agree to hinder their competitors; i. e., they shall not "prevent, oppose, or thwart, or retard, or embarrass, or obstruct, or stop, or impede, or put obstacles in the way of" their competitors, or even intend to do so, as an incident to any measure enabling themselves to compete, and such competitor may recover a penalty of $500.00, and the state one of $5000.00, per diem, if they do.

THE AUTHORITIES INVOLVING ANTI-TRUST ACTS.

Thus far, the argument has been an attempt to show that the main purpose and chief effect of the agreement are to foster and promoteand enhance the business of the members by placing them in a position to effectually compete, with no restriction of the rights of others, and with, at most, only the incidental result of restricting competition, if at all, in the most remote, indirect and inappreciable degree. We think that we have succeeded.

Now, there is some line at which legislative restriction of the liberty of contract must end. This is shown by all the cases, including those involving the Sherman Act, although the power of Congress under the Commerce Clause is held to be complete. That the border line had been reached by holding that the Sherman Act was constitutional, though construed to prohibit every contract which **did in fact** restrain inter-state trade, as a direct and necessary result, but only to a reasonable degree, is shown by the fact that this court, in the Joint-Traffic case, resorted to a doctrine applicable only to quasi-public corporations to uphold the decision of the Trans-Missouri Freight case, against attack upon constitu-

tional grounds, notwithstanding that doctrine would have no application in most cases arising under and within the Sherman Act.

Mr. Justice Brewer's subsequent recession from the position that reasonable restraints were within that Act, and his view that such a restraint could not be prohibited, shown by his specially concurring opinion in the Northern Securities case, are of more significance than would have been such expressions of his views in the former cases.

In **Whitnell vs. Continental Tobacco Company,** 125 Fed., 454, the former rulings of this court were accurately summed up, italics being ours, in this wise:

> "It is now settled by repeated decisions of the Supreme Court, that the test of the validity of a contract, combination or conspiracy challenged under the anti-trust law **is the direct effect** of such a contract or combination upon competition in commerce among the states. If its **necessary effect** is to stifle competition or to **directly** or **substantially restrict** it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its **main purpose** and **chief effect are to foster the trade and enhance the business** of those who make it, it does not constitute a restraint on interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress **must have a reasonable construction.** It was **not** its purpose to prohibit or render illegal the **ordinary contracts** or **combinations** of manufacturers, merchants and traders, or the **usual devices** to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do **not necessarily have a direct and substantial effect to restrict competition** in commerce among the states.
>
> **Hopkins vs. United States,** 171 U. S., 578;
> **Anderson vs. United States,** 171 U. S., 604;
> **United States vs. Joint-Traffic Association,** 171 U. S., 505;
> **Addyston Pipe and Steel Company vs. United States,** 175 U. S., 211;
> **United States vs. Trans-Missouri Freight Asso.,** 166 U. S., 290."

Quotations from each of these cases will show that the foregoing is an accurate statement of the holdings of this court as to what agreements are within the Sherman Act, and that the doctrine thus evolved is deduced from its enunciations in refutation of the proposition that that Act, construed as in the Trans-Missouri case, is unconstitutional.

In the Trans-Missouri Freight Association case, 166 U. S., 290, heard on bill and answer, this court sums up the case and its decision thus:

"The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal all agreements which **are in restraint of trade or commerce** as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

"Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations of the answer which are well pleaded, yet the **legal effect of the agreement** itself cannot be altered by the answer, nor can its violation of the laws be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiff's allegations as to the intent with which the agreement was entered into be regarded, as such intent **is denied on the part of the defendants;** and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the government is not necessary to be proved. **The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the Act?** We have no doubt it does. The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local.' To that end the association is formed and a body created which is to adopt rates, which when agreed to, are to be the governing rates of all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days notice of a desire to do so, yet while in force and assuming to be lived up to, there can be no doubt that **its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act."**

In the Northern Securities case, 193 U. S., at 331, the majority opinion sums up this court's former holdings, under the Sherman Act, in so far as is material to be stated here, thus:

"We will not encumber this opinion by extended extracts from the opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

"That although the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, **which directly or necessarily operates in restraint of trade or commerce among the several states** or with foreign nations;

"That the act is not limited to restraints of interstate and international trade or commerce that are reasonable in their nature, **but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce;**

"That combinations, even among private manufacturers or dealers, whereby interstate or national commerce **is restrianed,** are equally embraced by the act;

"That every combination or conspiracy **which would extinguish competition** between otherwise competing railroads engaged in interstate trade or commerce, and **which would in that way restrain** such trade or commerce, is made illegal by the act;

"That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by **its necessary operation, it tends to restrain** interstate or international trade or commerce or tends to create a monopoly in such trade or commerce **and to deprive** the public of the advantages that flow from free competition."

In the Joint-Traffic Association case, 171 U. S., 559, the constitutionality of the Sherman Act, under the Fifth Amendment, was challenged on the ground that this court had, in the Trans-Missouri case, construed it to prohibit contracts in restraint of trade, whether the degree of restraint be reasonable or unreasonable, and, replying to that contention, this court stated the holding made in that case thus:

"The whole foundation of the case on the part of the government was that the agreement there set forth **was a contract in restraint of trade,** and unlawful on that account. If the agreement **did not in fact restrain trade,** the government had no case;"

and then proceeded to quote the Trans-Missouri case as we have above done so, and added, with reference to the agreement there involved:

"The agreement **affects** interstate commerce by **destroying** competition and by maintaining rates above what compe-

tition might produce. * * * If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and, if executed, **it does so.** * * * *

"The effect upon interstate commerce must **not** be **indirect** or **incidental** only. An agreement entered into for the **purpose of promoting the legitimate business** of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

By these utterances, and others of like effect, and this quotation, it was distinctly the intent and purpose of the court to justify the Sherman Act under the Fifth Amendment. Though in terms it did not say Congress was without power to prohibit beyond the limits indicated, we think the inclination of the court to so hold was perfectly manifest.

In the Addyston Pipe Line case, 175 U. S., 225, replying to the contention that, under the power vested in Congress to regulate commerce, it was not competent for it to prohibit contracts which restrained trade, but merely legislative enactments, and that liberty of contract guaranteed by the Fifth and Fourteenth Amendments was beyond the power of Congress to interfere with, the court again justifying the interference, said:

"Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the **natural and direct effect** of such a contract will be, when carried out, to **directly, and not as a mere incident to other and innocent purposes,** regulate to any substantial extent interstate commerce. * * * *

"The provision in the constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into **those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally** regulate to a greater or less degree commerce among the states."

In **Smiley vs. Kansas,** 196 U. S., 453, this court justified **a part** of the Kansas statute attacked as an unwarranted invasion of the liberty of contract under the Fourteenth Amendment, speaking of an agreement between four competing wheat buyers within a small town whereby one who bought and shipped more grain than the others that excess purchaser would pay the others three cents per bushel on the excess, by saying:

> "That the transaction was within the **letter** of the statute, and that it **tended to prevent** competition in the purchase of wheat, is not open to doubt. It is also within the **spirit** of the statute. It **imposed an unreasonable** restraint upon competition. Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom, parties may **seek to further their business interests,** and it may not always be easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret agreement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is **substantially destroyed,** without any merging of interests by partnership or incorporation, is one to which the police power extends."

It is apparent from a glance at these decisions that the Sherman and State acts considered were justified **only** on the ground that they prohibited contracts which **did in fact** restrain trade, or which **did in fact tend to** monopoly, and which **necessarily** so operated. That was the line at which all the acts were held to stop, and such holding was assigned as the reason why the acts were not invalid. It is further apparent that the rulings are that the restraint must be a direct and necessary result, not merely incidental to some main lawful purpose, in order that it be competent for the legislature to prohibit the agreement, and that it is not competent for the legislature or Congress to go further.

Having now stated the basis of the majority opinions holding that the state enactments and the Sherman Act were constitutional, we may note the ground of dissent in those cases where dissent occurs.

In the Trans-Missouri case, the four dissenting justices, we submit it is perfectly manifest, were of the opinion that the Sherman Act would be rendered invalid under the Fifth Amend-

ment by construing it to prohibit contracts which restrained trade only to a reasonable degree. The dissenting opinion of Mr. Justice White, speaking for himself, Field, Gray and Shiras, JJ., said:

"The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the Act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not unreasonably restrain, it is valid under the general law, the decision, substantially, is that the Act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the Act of Congress itself is unreasonable. * * * * The question, then, is, Is the Act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being **unreasonable and as violative of the elementary principles of justice?**"

Again:

"It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But, as trade developed, it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, **both the freedom of contract and trade itself would be destroyed.**"

Again:

"The plain intention of the law was to **protect the liberty of contract** and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the **liberty of the individual to contract** and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the **liberty of the citizen** or the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of **freedom of contract,** it seems to me, is so interpreted as to gravely impair that freedom."

In the Joint-Traffic case, White, Gray and Shiras, JJ., dissented, without filing an opinion; but we interpret that dissent to be to the holding of the court that the Sherman Act, as construed in the Trans-Missouri case, was not an unauthorized invasion of the liberty of contract secured by the Fifth Amendment, because we understand that the members of the court do not dissent a second time to the same ruling, and the constitutional question was not raised in the Trans-Missouri case, while the other questions involved in the Joint-Traffic case were. There was no dissent in the Addyston Pipe Line case, we presume on account of this practice of the justices.

In the Northern Securities case, Mr. Justice Brewer, after remarking that he was with the majority in the Trans-Missouri, Joint-Traffic, and Addyston Pipe Line cases, specially concurred, thus:

> " * * * While a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments could not be sustained. Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contrcts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those **contracts which were in direct restraint of trade, unreasonable,** and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.
>
> "Further, the general language of the act is also limited by the power which **each individual has to manage his own property and determine** the place and manner of its investment. Freedom of action in these respects is among the **inalienable rights of every citzien."**

In the Anderson case, 171 U. S., 604, speaking of the refusal to deal with yard traders who were not members, or with commission merchants who did, this court stated the case thus:

"The question is whether by their adoption and by peacefully carrying them (the rules) out without threats and without violence, but by a mere refusal to do business with those who will not respect their rules, there is a violation of the federal statute;"

And, in the Montague case, 193 U. S., 38, it stated the case thus:

"It is not the simple case of manufacturers * * * refusing to sell to certain other persons. The agreement is between manufacturers and retailers belonging to an association in which the retailers **agree** not to buy of manufacturers not members * * * and manufacturers **agree** not to sell to retailers not members."

These two cases, the former holding the agreement legal and the latter that the agreement is illegal, contrasted, show what is termed by this court a "direct and necessary effect" to, or "necessary and inevitable" tendency towards, a restraint of trade, and that the case here presented is one which indeed is **not** "calculated to be effective."

This court holds that the Sherman Act prohibits even reasonable restraints, but that the same must be the **"natural and direct effect of such a contract when carried out * * * * and not a mere incident to other and innocent purposes"**; and that, the **Fifth** Amendment being, "to some extent, limited by the Commerce Clause", Congress has power to prohibit such contracts as "directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally", restrain trade, and that, therefore, the Sherman Act is a constitutional interference with the liberty of contract. See Joint-Traffic and Addyston Pipe Line cases.

The Mississippi court holds that the Act under consideraton prohibits all contracts "of the kind mentioned in the Act", all coming "within the terms of any section of the Act", whether it restrain trade, restrict commerce, or create monopoly, directly, indirectly, remotely, reasonably or unreasonably, incidentally or otherwise, and even though not even "calculated to be effective" of any such result, if it may be said that the parties foresaw, and therefore intended, that any such result should follow incidentally or otherwise.

If there is no limit to the power of state legislatures to pass anti-trust acts, this one is constitutional; if there is a limit, it is unconstitutional. This court has in each case so far presented,

said the limit had not been passed, but it always said there was a line beyond which they could not go, and we submit that that line has been passed in this case, and that sub-section (d) of the Act is unconstitutional. It is not "required by the public interests", is not "reasonably necessary", but is "unduly oppressive", "unreasonable", "unjust", "inappropriate", and "arbitrary", and, therefore, possesses every element of an unconstitutional enactment, as defined in **Lawton vs. Steele, Allgeyer vs. Louisiana, Adair vs. United States,** and **Lochner vs. New York.** There is **no** qualification of its terms, all agreements "of the kind mentioned", or "within the terms of any section", reasonable or unreasonable, fair or unfair, just or unjust, moral or immoral, rightful or wrongful, are prohibited, regardless of consequences, and the courts shall not construe it otherwise.

Great discussion has been indulged in by this court as to whether Congress, by the Sherman Act, did or could constitutionally prohibit agreements which **in fact did restrain trade to a reasonable degree,** and we believe that the specially concurring and dissenting opinions in the Northern Securities case show that this court, as now constituted, is of the opinion that a reasonable restraint cannot be prohibited within constitutional limitations. If we are correct in this opinion, of course this Act, as here applied cannot stand, because the limitation of the Fourteenth Amendment upon the power of state legislatures is at least as great as that of the Fifth upon the power of Congress, and if a reasonable restraint cannot be prohibited by Congress, the legislature could not prohibit an agreement **not calculated** to even hinder competition, or one which **in fact restricted** competition to a reasonable degree, but this court has given the question so much consideration we submit it without discussion.

AUTHORITIES INVOLVING GENERAL RIGHT OF CONTRACT.

In the consideration of the citizen's right to have or refuse business relations with another, the courts cite indifferently cases involving individual or combined action, those involving statutes or the common law, those involving or not the constitutional question, and those involving the right of the employer or the employed, an authoritative example of which is **Adair vs. U. S.,** 208, U. S., 161. It thus appears that, so far as the mere action of refusing business relations with another may be brought into

question, either under the general law or under statute, labor and capital are on exactly an equal footing, that the mere fact of combination does not alter the case, and that the decisions on the question are declaratory of the natural right of the citizen which the Amendments were designed to protect.

Judge Cooley's text, "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether his refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice, with his reasons neither the **public** nor third persons have any legal concern", has been so generally quoted with approval by the courts as to have become quite an axiom of our law, applicable alike in cases involving the constitutionality of legislative enactment and cases under the general law. **Lochner vs. New York, Adair vs. U. S., supra,** and **State of Wisconsin vs. Kreutzberg,** 58 L. R. A., 748, are recent citations of it by cases involving the constitutionality of statutes.

Mr. Tiedeman, page 5, says: "Any law which goes beyond the principle of **sic utere tuo ut alienum non laedas,** which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of of rights beyond what is **necessary** to provide for the **public** welfare and the **general** security, cannot be included in the police power of the government. It is a governmental **usurpation,** and violates the principles of **abstract justice,** as they have been developed under our republican institutions", which is quite as unreservedly approved by the courts. Tiedeman quotes Cooley's declaration both in his treatment of labor combinations and combinations of capital; and Freund, section 332, says: **"no American decision has ever punished a simple strike** as a criminal conspiracy"; and, Sec. 337, that the **power** to prohibit labor combinations must be co-equal with the **power** to prohibit combinations of capital, though the difference between the two might afford ground for legislative classification.

The case of **Adair vs. United States, supra,** holds that an Act of Congress, under the guise of providing a legislative scheme for arbitration, cannot restrict the liberty of an employer to refuse business relations with members of a labor union, saying that, in its essence, the right of the employer is exactly equal to that

of the employee, and that any legislation which attempts to destroy that equality of right cannot be tolerated in a free land, because an **arbitrary** interference with the liberty secured from such interference by the Fifth Amendment, citing indifferently cases of combination and individual action, and cases involving or not the constitutionality of statutes. Furthermore, while it is a matter of common knowledge that railroad companies, as do many other employers, consider labor unions as inimical to their business interests, and while, as to such companies, the personal aspect of the relation of master and servant might be considered, the court made no reference to either as grounds of decision,—the basis of the opinion being that the legislative branch of the government cannot have "legal concern" with the reason, or want of reason, for refusing the business relation, quoting Judge Cooley's axiomatic deliverance.

In **State of Wisconsin vs. Kreutzberg, supra,** cited with approval by this court in the Adair case, it is said that "Free will in the making of contracts, **and even in greater degree in refusing to make them,** is one of the most important and sacred rights intended to be protected", quoting from **Allen vs. Flood,** "A man's right not to work, or not to pursue a particular **trade** or **calling,** and to determine where and when he will work, is in law a right of precisely the same nature, and entitled to the same protection, as a man's right to **trade** or **work".** Judge Harlan, in **Author vs. Oakes,** 25 L. R. A., 414, speaking of an attempt by injunction to prevent a **combination** of workmen from quitting their employment in concert, said: **"It would be an invasion of one's natural liberty** to compel him to work for or remain in the service of another", and limited the injunction accordingly, "The general right of every one to pursue any calling, **and to do so in his own way,** provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment", was said in **Ruhnstrat vs. Illinios,** 185 Ill., 133.

In **Hundley vs. Ry. Co.,** 105 Ky., 162, cited by this court in the Adair case, it was charged that the defendant had agreements with other roads whereby **they notified each other** of cause of discharging employees, and the court held that the right to combine to so notify was lawful, but, of course, care must be taken not to commit a libel in communicating among themselves, and to the same effect are **Boyer vs. Western Union,** 124 Fed., 246; **Atkins**

vs. Fletcher, 55 Atl., 1074; **Ry. Co. vs. Richmond,** 73 Tex., 568; **Worthington vs. Waring,** 157 Mass., 421, and **McDonald vs. Illinois Central Ry. Co.,** 187 Ill., 529.

The Minnesota legislature passed an Act prohibiting a **combination** of employers from notifying each other of the cause of discharging an employee, which was sustained as a valid legislative enactment on the ground that, though not in terms so saying, it was aimed at mere **malicious** attempts to prevent employees from obtaining employment elsewhere, and not in any way interfering with the rights of employers to discharge for **any** reason, or **without** reason, the court expressly saving to the employers the right to **justify** the notice on the ground of mutual advantage flowing from the combination. It is impossible to read the opinion and note the court's absolute writing into the statute both saving features, without the conviction that they were firmly of the opinion that that was the only way in which the statute could be saved. It is a remarkable piece of legal gymnastics, terminating in pure judicial legislation, in order to save a statute.

Minnesota vs. Justus, 56 L. R. A., 757.

The Wisconsin court in **State vs. Huegin,** 62 L. R. A., 700, again had under consideration a **combination** of four publishers refusing to advertise at their regular rates for patrons of a rival publisher charging a higher rate, under a statute imposing fine and imprisonment for conspiring to "wilfully **or** maliciously" injure another in his trade or business "by any means whatever". The complaint charged that the combination was formed with the purpose to "wilfully **and** maliciously" injure, **and** that the injury **resulted.** Some of the defendants demurred to the charge, and some pleaded. The demurrers, of course, admitted the purpose and result, and the pleas did not sufficiently deny either. The court **held** that the statute was valid as applied to a **purely malevolent injury,** finding also that the case made was such. It said: "The malice of the statute is evidently malice in law, not necessarily malice or ill will in fact. It means a wrongful act done intentionally without just cause or excuse. * * * * If we can see in the agreement, by reasonable inference, **the independent purpose to harm** * * * * that is sufficient as regards the element of malice. * * * * There seems to be no difficulty about that. * * * Instead of looking into the agreement in vain for anything reason-

ably suggesting an **intent to harm** * * * * we have **great difficulty in discovering any other intent,** and are not able to solve that difficulty without resorting to conjecture". The state court upheld the statute, thus applied, saying the statute, construed as merely declaratory of the common law, covered the case made

This court, **Aikens vs. Wisconsin,** 195 U. S., 194, upheld the statute on the ground that the state court had so limited it, and interpreting " 'maliciously injuring' to import doing a harm malevolently, **for the sake of the harm itself,** and not as a **means to secure some further end legitimately** desired", and not as importing something merely foreseen, saying that a "purely malevolent act may be done even in trade competition"; and that a "combination calculated to cause temporal damage", when formed for that purpose and the damage is **done** maliciously, can be punished, notwithstanding it be worked out by means lawful in themselves, but which are steps in a criminal plot. Eight members of the court concurred, on the ground that the state court had limited the act as indicated, but Mr. Justice White dissented both on the ground that the state court had not so limited the statute, and on the ground that it was in violation of the Fourteenth Amendment so limited.

The Wisconsin case did not present a mere passive, let-alone policy, a mere refusal to have business intercourse with advertisers, but the combination required agreements that such advertisers should not patronize another, evidently such other's patrons, or there could have been no resulting injury, all with a **malicious** purpose to injure, and for which **no justification** could be conjectured, and none was assigned. In this case, there is a justification; no agreement of the manufacturer is required or accepted; no interference with him or his patrons is made; he is simply told of the agreement and asked if he made the sale; the mention of the agreement to him is not information, for the same is matter of public notoriety, and in no wise secret, but is merely an assignment of the reason for the inquiry made; if he made the sale, he need not attempt to get the patronage of the members, while, if he did not, **he simply may compete** with all other manufacturers, not competitors of the members, for their business; not even a withdrawal of patronage is necessarily involved.

Even **Anderson vs. Cleland,** 5 L. R. A., 136, the Nebraska case referred to by the state court, upholds this combination under a

statute almost like the one here involved, for it says: "While **persons** have a right to withdraw their trade from whom and as they please, **they** have no right to unite **in** restraint of competition; and when **they** go beyond mere withdrawal of business, and employ coercion and intimidation to prevent free dealing, a **different** question is presented". This case was, in fact, a combination between wholesalers and retailers, dividing territory and fixing prices. No case, either under the common law or statute, can be found, which, by any fair inference, condemns the action of this Association, or which, if at all in point, does not **support** it, by fair inference, at least.

In the case of **Jackson vs. Stanfield** (Ind.), 23 L. R. A., 588, it is said: "It is not the mere passive, let alone policy, the withdrawal of all business relations, intercouse and fellowship that creates the liability, but the threats and intimidation shown in the complaint", and again, that "It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves," and cites **Delz vs. Winfree,** 16 S. W., 111, to the point that interference with the patrons of the manufacturers is essential to the illegality of the agreement, and shows that, fear of penalties imposed by the agreement with wholesalers upon them, deterred them from dealing with the plaintiff, among several other features again and again condemned by the courts.

Now, unless the state can exercise some extraordinary right of requiring that retail lumber dealers shall completely subordinate their interests to those of wholesalers, as a class, or to those of consumers, as a class, this legislation is unconstitutional, or the foregoing decisions and texts are in error. They are forbidden to **intend** to hinder their **competitors,** for no imaginable reason, except that the former **class** may not be hindered in taking from them the cream of their trade, and that the latter **class** shall have the benefit presumably flowing from the struggle between the two, with no embarrassment to the manufacturer, but at great disadvantage to the retailer. Complete subordination of self-interest, absolute self-abnegation, is required of the retailers. They must not hinder their competitors even at the expense of surrendering to them all of their confidential trade secrets essential to their own maintenance of the strugale. They must surrender their right to refuse, for perfectly legitimate reasons and as a necessity, to make contracts with whom they please, because they

foresee, and, therefore, may be said to intend, that manufacturers and wholesalers **may** be hindered in their right to make them with whom they please, or because they foresee that, if they exercise their right to refuse to make contracts detrimental to their interests, some manufacturer or wholesaler **may** refuse to make one beneficial to consumers. Upon the single assertion of the court that the contract is forbidden though not even **calculated** to restrict competition, the Act must be condemned.

The Act goes far beyond **sic utere tuo ut alienum non laedas,** and, unless the agreement be **calculated** to restrict trade, is a mere meddlesome interference of the legislature, not simply with liberty in the abstract, but as a property right, and, therefore, fairly and squarely within the meaning of the Amendments. It forbids the agreement on the part of the retailers that they will bestow their patronage only upon such wholesalers and manufacturers as observe a custom among their class of tradesmen, which has been immemorially observed by them, and has, in fact, become an **institutionally** fair and just custom, as recognized by the civilized world. In and by the agreement there is absolutely no restriction of the rights of others, there is merely the assertion of the rights of the defendants. There is no injury to others. There is no justification for the statutory interference with the liberty of the defendants. The statute is unjust, unreasonable, and arbitrary. It tends to the destruction of one class it was designed to protect.

THE STATUTE IS UNCONSTITUTIONAL BECAUSE THE RIGHT OF JUDICIAL REVIEW IS DENIED BY ITS TERMS.

In our summary of the holding of the court in this case, and in the statement of the language of the Canning Company and Oil Mill cases, **supra,** it is shown that a literal construction of the act and a denial of inquiry by the courts as to any matter, except "is the agreement within the terms of the Act," or, is it "of the kind mentioned in the Act," breathe from every utterance of the court, in disposing of our several contentions presented in this case.

To say that the legislative declaration that "the contract of the kind mentioned in the Act," or, "the contracts within the terms of any section of the Act," "are inimical to the public

welfare," is "the mere declaration of the effect of a trust" is to make of the phraseology mere idle legislative prattle; but, to say that the courts are thereby precluded from inquiry into the nature and effect of any such agreements, is quite a different thing altogether. All the language of these cases about "inimical to the public welfare" is mere idle prattle, unless it means that the courts, as said in the Oil Mill case, are not empowered to make any other inquiry. It is in fact mere idle surplusage, unless that is what is thereby meant.

The court treats it as of that exact significance, in this case, when it answers our every contention by reference to the language of the Act, and refers us to the legislature for relief, saying "**the discretion,**" not a partial or "large discretion," but "**the** discretion" to determine whether or not the agreement is inimical to the public welfare, is "vested," in that body,—not merely primarily, but finally and conclusively, is the import of the language.

The court's decilning to pass upon or refer to the constitutional objection made to the statute as construed, considered in the light of its every utterance, clearly implies that the police power of the state was considered plenary and absolute. Citizens must look to the law to define unfair competition and for protection against the same; if they cannot meet it, they must appeal to the legislature; if they cannot buy from **and** compete with a man, they must ask the legislature to give relief;although it be a fact that an agreement not calculated to restrict competition can hurt no one, the legislature has said it can, and that settles the question for us; all peaceful and lawful methods of doing business, though not calculated to restrict trade, but within the letter of the Act, must be abandoned; anyone wishing to survive in the struggle of competition must not do so by any method which is intended to hinder a competitor, though in fact not calculated to be effective, because the legislature has "the discretion" to so provide and has done so, and this court is without power to review the action of that body, is the substance of the ruling here made.

If, by the legislative declaration, it was not intended to cut off judicial inquiry, the declaration is idle legislative prattle; if, by the language of the court with reference thereto, it was

not meant to imply as much, we fail to perceive that it has any meaning; if that is the import to be attached to it, the Act is as surely unconstitutional as if the Act had said: Whether this measure is a "fair, reasonable and appropriate exercise of the police power of the state;" or an "arbitrary and unreasonable interference with the contract property rights of the citizens," shall not be held a judicial question, the same being hereby declared to be a proper exercise of that power.

The liberty of contract protected by the Fifth and Fourteenth Amendments from legislative restriction is a property right of the highest and most sacred nature. That it is a property right is the postulate upon which rests the proposition that the citizen's liberty to contract, as distinguished from his freedom from personal restraint, is within the due process clause of the Amendments. It is not merely the liberty to be free of physical restraint of his person, but the right to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where and with whom he wills, to earn his livelihood by any lawful calling, to pursue any lawful avocation, and, for each of these purposes, to enter into any and all contracts which may be necessary, proper or essential, to the accomplishment thereof. **Allgeyer vs. Louisiana,** 165 U. S., 578.

The legislature is vested with a "large discretion" to determine what is inimical to the public welfare, and what measures are necessary to promote such welfare, but its determination is not final or conclusive, as held by the court below; it is for the legislature primarily, but for the courts finally, in every case involving a deprivation of property rights, tangible or intangible, to say whether, first, "the interests of the public generally, as distinguished from those of a particular class, require such interference;" and, second, whether "the means are **reasonably necessary** for the accomplishment of the purpose, and not **unduly oppressive** upon individuals. The legislature may not, **under the guise** of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations." **Lawton vs. Steele, supra.**

It has repeatedly been **held** by this court, that, "in **every case** coming before this court," involving the exercise of the police power of the state and the protection of the Fourteenth

Amendment is claimed, "the question **necessarily arises:** is this **a fair, reasonable and appropriate** exercise" of that power, "or is it an unnecessary, unreasonable and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to his business (labor) which **may seem to him** necessary and appropriate for the support of himself and family? * * Otherwise, the Fourteenth Amendment would have no efficacy, and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be," **Lochner vs. New York,** 198 U. S., 45, cited and quoted in **Adair vs. United States,** 208 U. S., 161.

In **Chicago, etc., Ry. Co. vs. Minn.,** 134 U. S., 418, this court held that a legislative enactment, providing that the action of the railroad commission fixing rates should be final and conclusive and not subject to review by the courts to ascertain their reasonableness, was unconstitutional, even though the rate fixed had been found to be reasonable, because such legislation deprived the railroad companies of the use of their property without due process of law; and this, even though they were engaged in a "business in which the public had an interest," and their property was "affected with a public use."

In **ex parte Young,** 209 U. S., 123, this court held that an act of the legislature, fixing rates and providing such enormous penalties for its violation as to justify the inference that they were imposed for the purpose of intimidating the roads into submission to such rates and which were calculated to so intimidate them, was unconstitutional as amounting to a denial of the right of review by the courts, and, therefore, to a taking of the use of their property without due process of law.

Now, if the legislature cannot finally and conclusively fix compensation for the use of property "affected with a public use," of that used in a "business in which the public has an interest," and if an attempt to do so renders the legislative act unconstitutional on its face, it would be difficult, rather impossible, to assign a reason for holding that a legislative enact-

ment which deprived one of the right to contract and associate in the regulation of his own strictly private interests is permissible.

If the contract here involved be not in fact calculated to restrict trade, it cannot be hurtful or inimical to the public welfare, and, if it be not so inimical, legislative interference therewith is purely and unquestionably arbitrary and unreasonable, even though the right to make it subserved no purpose of those making it, and especially is this true when it does promote and foster the legitimate interests of the parties, as in this case. Unless the legislative interference serve the public weal by preventing the parties from so using their own as to injure others, it cannot be within the police power. Tiedeman's Text, **supra.**

If the legislation be not in fact in the interest of the general public, as distinguished from some particular class, it cannot be sustained "under the guise of the police power." **Lawton vs. Steele, supra.** If it be reasonable, but judicial review is cut off, it is without due process. **Ry. Co. vs. Minn., supra.** If it go beyond prohibiting railroads from maliciously combining to prevent a discharged employe from getting other employment, it is without due process. **Justis vs. Minn., supra.** If it prohibit legitimate motives of gain and malice, by a combination of publishers, it is void. **Alkin vs. Wisconsin, supra.** In all these cases, the alleged police power of the state was for review by the courts. If it prohibit an intended restriction of competition, incidental to legitimate action necessary to the maintenance of the struggle by the members of a combination, it must be unconstitutional. **Addyston Pipe Line** and **Joint-Traffic** cases, **supra.** In these two cases, the complete, the plenary, power of Congress to regulate interstate trade was for review by the courts, under the due process clause of the Fifth Amendment. But, the Mississippi Act, by its declaration that what it forbids in "kind" or "in terms," is inimical to the public welfare, determines that from which its power and discretion would arise, if determined by judicial authority.

No other meaning can be attached to the declaration of the Act, or the language and decision of the court, and the Act must be unconstitutional.

Under both our state and national decisions it runs back then, at last, to the question: Whether the contract or combination assailed, is, "in its necessary effect," inimical to the public welfare. In the determination of this crucial question, it should be carefully borne in mind that the underlying matter is, after all, the personal liberties of the citizen; that the public is nothing more than the aggregate of individual citizens; that there can be no matter in which the public can be more deeply concerned than in the preservation to all invididuals of the largest possible liberty of contract and pursuit of happiness. From which considerations we deduce the important consequence that the rights of the individual are not to be denied, nor seriously impaired, by any merely apprehended or conjectural conflict with the public welfare; but only in those cases where there is, as this court has phrased it, a "**necessary** effect," which **is** inimical.

Nor is it any answer to the foregoing to say that it is for the legislature to define the public policy of the state. Within certain limits, that is true, and the legislature may properly declare that the policy of the state is to preserve and foster freedom of trade and competition. But, on the other hand, it is a judicial, and not a legislative, function, to determine whether the particular contract, or the particular combination, is, "in its necessary effect," inimical to the public welfare. The general rule is for the legislative department; the particular instance, for the judiciary.

THE ENORMITY OF THE PENALTIES PROVIDED FOR BY THE STATUTE RENDERS IT UNCONSTITUTIONAL.

In our statement of the case, we have shown that the plaintiffs in error are now being sued for the minimum sum of $14,184,000.00, and a maximum of $354,600,000.00, because of the agreement here under review, and that about one-half of that sum accrued while these proceedings were pending to test the question whether or not the agreement was, as thought by the state senate and counsel for plaintiffs in error, legal. The facts stated in this connection may not be properly before the court, not appearing more directly of record, but they may, nevertheless, legitimately serve the purpose of illustration, and no objection can be made to the use of actual, instead of sup-

posed, cases as illustrations. It is permissible to use "object lessons" for illustration.

Anyway, the statute shows the possibilities under it, if the "object lessons" be disregarded, and we entertain no doubt that the court will, from them, be able to determine that the penalties are so enormous as to justify the finding that they are imposed for the purpose of enforcing submission, without resort to the courts, to the terms of a law, the most extreme ever enacted by a legislative body.

It will not do to say that the parties are in no position to assert this defense, because they have taken the risk of the violation of the law. That would be to say that they must be prohibited by an unconstitutional enactment, because they violated it.

We are aware that Mr. Justice White, in the "Commodities Clause" case, held that this point could not be raised there, because no penalties were sought to be recovered, and we will probably be met with that suggestion here. The report of that case is accessible to us only in advance sheet form, and we are unable to distinguish that case from this, or this one from **Ex Parte Young,** 209 U. S., 123, but we submit that, the ruling of the Young case that the question was properly raised in the **habeas corpus** proceeding, although the showing was that Mr. Young did not intend to inflict penalties and was not attempting to do so, was correct, in view of the fact that the basis of the ruling was that the enormity of the penalties amounted to a denial of the right of review by the courts, and, therefore, to a taking without due process. There, and in **Cotting vs. Kansas,** cited in the Young case, as well as in this case, the remedy asserted was under the statute, but not for the infliction of the penalties imposed. In each of these cases, as in this, the section providing for penalties was separable from the body of the law in question, and, in the Young case, it was held, and, in the Cotting case, assumed, that the question was properly before the court. We can see no difference in principle between either of these cases and this.

We submit, further, that, if the Young and "Commodity Clause" cases can not be reconciled, the former case adopted the correct view. The basis of the ruling in the Young case was

that the imposition of the enormous penalties for violating the rates fixed by statute amounted to denying the right of judicial review of their reasonableness, and, therefore, amounted to taking without due process, and made the statutory rate there fixed, in principle, like the commission rate fixed in the case of **Chicago, &c. Ry. Co. vs. Minn., supra,** in so far as the due process clause of the Amendment was invoked. In each of these cases, too, the law was held to be void on its face, irrespective of the question of the reasonableness of the rates.

It must, in view of the true basis of the Young, Cotting and Railroad cases, be ruled that the question is before the court, although penalties are not sued for, else we have the incongruous situation of enforcing an unconstitutional enactment, unconstitutional because of a denial of due process,—enforced though unconstitutional and void. The question is one altogether different from one arising under the common constitutional prohibition against excessive fines and penalties. In such case, it would be a question of whether a fine disproportioned to the grade of the offense could be imposed by due process, while here, the question is whether or not the excessive fine is, in its essence, a denial of due process.

There can be no ground for distinction between a case involving the fixing of rates and one limiting the right of contract, so as to take the latter out of the principle of the Chicago &c. Ry. Co. case. The power of the legislature to fix rates is incomplete, no less than the power to limit the right of contract. In its essence, each power is the taking of a property right, and the one involves no less complication of facts than does the other. Indeed, the matter of competition is so complex as that almost every act of a man in and about his business, to some extent, involves the matter of some competitive expedient, and the necessity, effect, and expediency, of a given means vary in different businesses. All such matters, however, involve the use, acquisition and enjoyment of property, and the question "necessarily arising" in every case, where the liberty of contract is limited under the police power, is: Is that liberty fairly, reasonably, and necessarily restricted, or is it restricted unduly, oppressively, or arbitrarily? And this question, with whatever complication or simplicity of fact attending, is for the

court in one case no less than in another. None is a more intricate matter of investigation than that of what competitive measure is reasonable, fair, and just, or of which the citizen may be reasonably, fairly, and justly deprived in the interests of the public welfare.

As to the enormity of the fines, the "object lesson" is a quite sufficient demonstration. Each day, a man refuses to deal with his competitor, he is fined not less than $200.00, nor more than $5,000.00, and he is, in addition, liable to such competitor for the sum of $500.00, if more than one, $500.00, each, **ad infinitum.** All this by way of procedure civil in form, but indictment and conviction, may, at the election of the attorney general, be resorted to, and that means imprisonment, if the fine be not paid. It may be stated in reply to our brief that only $14,184,000.00 is sued for, which, as the matter of pleading now stands, is true; but that fact is due to the assumption of judicial power by the attorney general, in that he has sued for the minimum, but he has no such discretion under the statute. It is for the court to say what fine shall be imposed within the range provided for by the statute. The fact, however, that the attorney general has assumed so much and that he has settled a minimum liability of $2,955,000.00 with fifteen of the plaintiffs in error for the sum of $12,000.00, or $800.00 each, **on condition that they withdraw from the appeal to this court asserting their constitutional rights,** is remarkably significant in more aspects than one.

CONCLUSION.

The question presented does not involve any matter of local concern, or local conditions, of which state courts and legislatures can better judge than can this court, as in cases involving the height of buildings, or fraudulent practices of mining corporations, or the regulation of warehouse charges, or similar matters, with reference to which this court has felt called upon to defer to the judgment of legislatures and state judges, but is one of preserving trade and commerce, about which the independent judgment of this court should be exercised freely, and such judgment we invoke.

The peril of the plaintiffs in error, both as regards their power to maintain trade, and as to their impending ruin by the

suit for the enormous penalties imposed by the statute, and an agreement with counsel for the state to submit without oral argument, we offer as our apology for the length of this argument.

It is respectfully submitted that the decree appealed from should be reversed, and sub-section (d) of the Mississippi Act held unconstitutional.

Respectfully submitted,

E Mayes

Counsel for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

(No. 493.)

GRENADA LUMBER COMPANY et al.,
Plaintiffs in Error,
vs.
STATE OF MISSISSIPPI,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

By C. D. JOSLYN.

It seems necessary for the sequential order of this brief to state so much of the bill and answer in this case as is necessary to show the application of the proposition which will be discussed.

The Attorney General of Mississippi filed a bill in equity to dissolve and put out of existence the Retail Lumber Dealers' Association of Mississippi and Louisiana, not claiming that any of its acts have been unlawful, but simply that its members, by its constitution and declaration of purpose, have entered into an agreement which is unlawful under a statute, forbidding among other things combinations to restrain trade and hinder competition. The bill sets forth the entire constitution of that organization and bases all of its allegations of facts upon it. That constitution contains a declaration of purpose, sets forth the object, limitation and restrictions upon its members, and points out how persons may become members or withdraw therefrom.

The declaration of purpose is as follows:

"We realize the convenience and the necessity of the retail lumber dealer to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business.

"We recognize the absolute right of every person, partnership and corporation to establish and maintain as many retail yards as they may wish, whensoever and wheresoever.

"We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price they may see fit.

"We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealers of accurate information as to the nature and extent of such competition, where any exists.

"And, recognizing that we, as retail dealers in lumber, sash doors and blinds, cannot meet competition from those from whom we buy, we are pledged as members of this Association to buy only from manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stock commensurate with the demands of their communities, and we are pledged not to buy from lumber commission merchants, agents and brokers, who sell to consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants, agent or broker.

"And we appreciate the educational advantage to us derived through association and exchange of ideas in matters concerning our business, such as 'stock keeping,' 'grades,' 'sizes,' 'different kinds of building material,' 'advertising,' 'bookkeeping,' 'delivery,' 'account and statement rendering,' etc.

"We appreciate the necessity of good credit and honest business dealings, and we discountenance any method contrary to these, and will not permit those guilty to remain members of this Association.

"We realize the fact that the retail lumber dealer often is compelled to have business dealings with those of whom he knows nothing, and that some system of co-operation in the way of advising each other against buyers who are disposed to neglect their obligations, refuse to pay, complain without cause, etc., should be in effect, and recognizing and appreciating the advantage of co-operation in securing and disseminating any and

all proper information for our mutual convenience, benefit and protection, we have organized this Association, and do hereby adopt the following articles for the government of our affairs."

It also sets up the Articles of Association, in which appear the following:

"ARTICLE TWO.

THE OBJECT.

The object of this Association is and shall be to secure and disseminate among its members any and all legal and proper information which may be of interest or value to any member or members thereof in his or their business as retail lumber dealers, and to carry into actual effect our 'declaration of purpose.'

ARTICLE THREE.

LIMITATION AND RESTRICTION.

Section 1. No rules, regulations or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

Section 2. No coercive measures of any kind shall be practiced or adopted towards any retailer, either to induce him to join the Association, or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this Association be used or allowed against any retailer for the reason that he may not be a member of the Association, or to induce or persuade him to become such member.

Section 3. No promises or agreements of any kind shall be requisite to membership in this Association, save those provided in these 'Articles of Association and Declaration of Purpose,' nor shall any members be restricted to any particular territory, but may compete any and everywhere.

ARTICLE FOUR.

MEMBERSHIP.

Section 1. Any person, firm or corporation within the territory of this Association, regularly engaged in the retail lumber trade, carrying an assorted stock of lumber and building material reasonably commensurate with the demands of his community, shall be considered a retail lumber dealer and be eligible to membership in this Association."

Article 7 defines the method by which the purposes of the organization may be carried out. The course defined is substantially as follows: Any member having

cause of complaint against a manufacturer or wholesale dealer shall notify the Secretary of the Association, giving as much detail as possible, within thirty days after the matter complained of shall have happened. It is then the duty of the Secretary to ascertain whether the complaining member carries a stock commensurate with the demands of his community, and, if he does not, he shall ignore the complaint, but, if such stock is carried, he shall notify the wholesaler that the rules of the Association do not allow its members to buy from wholesalers who sell to consumers. If the Secretary or the executive committee shall find that the facts asserted by the complaining member are true, then the Secretary shall notify all members of the Association and they shall discontinue buying from such wholesaler until notified by the Secretary that the wholesaler has discontinued the practice of selling to consumers. The Secretary is forbidden to enter into any agreement with the wholesaler that any one of the Association members will deal with him, nor shall he exact a promise from the wholesaler that he will not sell to consumers, "nor shall any result other than that of the members refusing to buy from such manufacturer or wholesaler follow from the steps taken as above provided for."

It will be observed that the provisions of this agreement do not apply to localities where there are no retail dealers, nor where there are retail dealers who do not carry sufficient stock in trade to supply the needs of the community.

It will be further observed that the duties of the Secretary cannot be made a cover for some other secret agreement or tacit understanding to commit oppressive, coercive or obstructive measures.

All those things are forbidden by the Articles of Agreement.

Notwithstanding this, the Bill of Complaint alleges that the agreement has for its necessary effect the limiting and destruction of competition, and that by reason of said agreement the defendants have formed and are now operating a trust and combine and constitutes a combination, contract and agreement "between two or more persons, corporations, firms and associations of persons in restraint of trade; *to limit, increase or reduce the price of a commodity; to limit, increase or reduce the production or output of a commodity; intended to*

hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity; to engross or forestall a commodity; to place the control to any extent of business or of the products and earnings thereof in the power of trustees, by whatever name called; by which any other person than themselves, their proper officers, agents and employes, shall or shall have the power to dictate or control the management of business; or to unite or pool interests in the importation, manufacture, production, transportation or price of a commodity, and is inimical to the public welfare, unlawful and criminal conspiracy." None of these things which are italicized appear in the agreement by any possible construction of it, and they may be dismissed from further consideration.

As there are no allegations of fact not deduced from the agreement itself, and the answer admits the making of it, we need not concern ourselves further with the bill.

The answer admits the making of the agreement in the form of a Declaration of Purpose and Articles of Association, but denies any intent to violate or evade the law, and affirmatively alleges that the agreement is a defensive measure.

The case was heard on bill and answer, and it was finally determined by the Supreme Court of Mississippi that the agreement came within the words of the statute invoked by the Bill of Complaint, a part of which is as follows:

"A trust and combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms, or associations of persons, or between one or more of either, with one or more of the other.

(a) In restraint of trade.

(b) To limit, increase or reduce the price of a commodity.

(c) To limit, increase or reduce the production or output of a commodity.

(d) Intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity.

(e) To engross or forestall a commodity.

(f) To issue, own or hold the certificates of stock of any trust or combine.

(g) To place the control to any extent of business, or of the products and earnings thereof, in the power of trustees by whatever name called.

(h) By which any other person than themselves, their proper officers, agents and employes, shall or shall have the power to dictate or control the management of business.

(i) To unite or pool interests in the importation, manufacture, production, transportation or price of a commodity, and is inimical to the public welfare, unlawful and a criminal conspiracy."

Although we are quite well aware that criticism of the reasoning of the opinion in the case below may not be wholly profitable, yet we have to examine it far enough to determine what was decided.

As we understand that decision, it is to the effect that, if the agreement discloses an intent on the part of the defendant to do certain things, then the agreement came within the literal terms of the statute, whether the things to be done were in fact inimical to the public welfare or not, or whether the means employed were lawful or unlawful, and that the legislative determination was final and cannot be reviewed by the courts.

The Mississippi court apparently recognizes that there are many cases which uphold such agreements as that involved here, but says that they are upheld under a general rule that what one may lawfully do any number acting in concert may do, and declares the doctrine to be unsound and that it prefers to follow the rule in Bailey vs. Master Plumbers' Association, 46 L. R. A., 562.

First of all, we do not understand that there is any such precise rule as above stated, at least we do not claim it. We understand that the rule to be applied depends upon the facts and conditions in each case, and that oftentimes the rule above made may be applied and that in other cases it may be said with equal correctness that what one may do a number acting in concert may not do. We suppose the reason for this is that, in the one case, concerted action is not inimical to the public welfare, but is in the other. We think that the Mississippi court has misapprehended the fair import of the Tennessee decision. That, as we read it, goes no further, neither do the cases which it cites, than to say that there are cases where concerted action does become

injurious to the public welfare where individual action might be powerless to injure.

We think the position taken by us is quite clearly shown by some of the cases cited in the prevailing opinion in

Northern Securities Co. vs. U. S., 193 *U. S.*, 197.

In *Morris Run Coal Co. vs. Barclay*, 68 *Pa.*, 173, 186, it appeared that there was a combination, wide in its scope, general in its influence, and *injurious in its effect.* The Pennsylvania court said:

> "Such a combination is more than a contract, it is an offense. * * * In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the combination of many what severally no one could accomplish and even what, when done by one, would be innocent. * * * There is a potency in numbers when combined which the law cannot overlook where injury is the consequence."

In *Arnot vs. Pittston & E. Coal Co.*, 68 *N. Y.*, 558, there was a combination of twenty-four companies in order to give one of them a monopoly of coal in a particular region. The New York court said:

> "A combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal."

In the case of *Central Ohio Salt Co. vs. Guthrie*, 35 *Ohio St.*, 666, there was a combination among manufacturers of salt in a large salt producing territory, about which the court said:

> "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other cases are cited in the opinion in the Securities Company case illustrative of this same proposition, and

we accept the doctrine without equivocation. But our contention is that an agreement to do something which is not inimical to the public is not invalid merely because the legislature has declared it so, and in no event can the legislature by such declaration preclude the courts from inquiring into the matter. We concede that the determination of any question of public policy is primarily within the domain of legislation, and not primarily a judicial question. But when the legislature has defined what public policy shall be, and has provided the means for enforcing its determination, it yet remains to inquire whether in the attempted exercise of police power the legislature has invaded individual liberty to an extent beyond its power. This inquiry is always for the judiciary.

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not under the guise of protecting the public interests arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."
>
> *Lawton vs. Steel*, 152 *U. S.*, 137.
> *Cotting vs. Godard*, 183 *U. S.*, 79,

and cases cited.

The opinion in this case held in specific terms that under the act it was not necessary to show or prove anything beyond a mere intent to accomplish an unlawful object, and, finding in the agreement an intent to accomplish an unlawful object, it declined to inquire whether the intent *could* be accomplished by the means provided or not.

We do not so understand the law. A mere intent can neither be injurious nor criminal unless *something* is done to carry it out. That something must be that by which the intent may be accomplished. A person may intend to break into a safe, but so long as the intent is only in his head, and he commits no act, he is not in

law a burglar. But, if a person provides himself with burglar's tools, he then does something by which he can carry out his intent; therefore, it is made a crime to have in possession the implements necessary or convenient for the commission of the crime.

So in this agreement there must be not only an intent to restrict trade or hinder competition, but the things to be done and the means used must be such that the restriction and hindrance may be accomplished. Without these the intent is ineffectual. Therefore, the statute as construed undertook that which as a fact is impossible because the thoughts of mankind which do not develop into acts cannot be controlled by legislation. Nor is it within legislative power. The court said further:

> "Again it is said that it must appear certain that the means adopted by the retailer will be effective, and that as a necessary result of their action that competition will be stifled and the freedom of trade restrained. This argument has met with favor with some courts in considering the common law and particular statutes, but we take it that the legislature of this state must have had in view all of these various and vexing questions and sought to set them at rest in the plain and explicit language used therein. Under our statute, which provides that a combination 'intended to hinder competition in the sale or purchase of a commodity, shall be a criminal conspiracy,' it is unimportant to consider whether the means adopted are calculated to be effective or not. The vital question is the design and purpose, the intent of the combination, and it is likewise unimportant to consider whether the means adopted be peaceable and otherwise lawful if the purpose and intent of the combination be to accomplish the unlawful object."

The Mississippi court then proceeds to state that the expressed and avowed object and purpose of the Retail Dealers' Association was to prevent the wholesaler from competing with the retailer in selling to the consumer, and adds:

> "Nor is this avowed purpose confined to a prevention of what is sometimes called unfair competition, and to any and all competition of every sort. So far as these retailers could prevent it was

> their purpose and intent, if language means anything, to deter the wholesaler from competing with the retailer in selling to the consumer *at any time, in any place and at any price,* by a threat of the withdrawal of their trade. This, we believe, is directly in violation of the plain letter of the statute."

This means clearly a misapprehension of the contract. There is no attempt to prevent the wholesaler from selling to consumers in any locality where there are no retailers with stock sufficient to supply the needs of the community. That this would cover an extensive portion of the state is self-evident as the call for lumber in small places and sparsely settled districts would be so small that it would not warrant the establishment of a retail yard. But, be this as it may, it is our contention that the agreement does not tend to "restrain trade" nor to "hinder competition" within the meaning and acceptation of those phrases.

The court then refers to unfair competition by the wholesaler with the retailer, and says that it can understand that such competition in certain circumstances might destroy the retailer to the ultimate detriment of the public, thus indirectly stifling competition, and then says:

> "We have no such case before us, but only the case of a combination intended to destroy all competition by the wholesaler with the retailer whether fair or unfair."

We shall undertake to demonstrate that all competition by a wholesaler with a retailer is not only unfair, but is commonly understood to be in bad faith.

But the court proceeds to say that, if there were unfair competition, it is not for the retailer nor the court to undertake to say what is an unfair competition, because the statute itself defines it and that definition made by the legislature is binding upon all other courts. The statute of Mississippi being thus construed by the court of that state, we must accept that construction here. Thus we have a statute which, by its terms as construed by the state court, undertakes to prevent an inquiry into its validity by the courts. Not having the printed record before us we have been unable to refer to the page number in the foregoing quotations.

In order to understand a little more clearly what the Retail Dealers' Association was protesting against in its Declaration of Purpose, we desire to call the attention of the court to the common and accepted understanding of the relations between wholesale dealers and retail dealers.

The words "wholesale dealer" or "wholesaler," "retail dealer" or "retailer," have a fixed, definite meaning in trade which is well understood everywhere, and everywhere, so far as we know, they have the same meaning.

A wholesale dealer is one who sells in large quantities to retail dealers or retailers, but not to consumers who are necessarily the customers of the retailers. It is equally well known and understood that "wholesale price" is quite different from "retail price," that the wholesale price relates to sales in large quantities and naturally a less price than retail prices where goods are sold in small quantities. We scarcely need to state that retailers can only do business by purchasing at a wholesale price and selling at a retail price. The business intercourse of civilized mankind is thus crystalized into well defined classifications.

The jobber or wholesaler naturally had to rely upon the retailer for his trade. The retailer naturally relied upon the general practice and understanding that wholesalers only dealt with retail dealers. From the very nature of the relations between the two classes, the wholesaler holds himself out to all his retail customers as one who will not sell to the customers of the retailer, and it is directly upon that tacit understanding that the retailer buys of him. It goes without saying that he could not deal upon any other basis and stay in business.

Without doubt, the success which some great combinations and enterprises have had in destroying and absorbing retail trade in certain lines has lead many wholesale dealers to try to do likewise. That the retail lumber dealers are apprehensive on this score is clearly shown in their Declaration of Purpose. Whether these apprehensions arise from the many public assertions of a great combination of lumber manufacturers and jobbers or from actual knowledge of conditions does not appear, nor in a legal sense is it of great importance. While it is clear that the agreement is in fact a defensive measure, and

for that reason ought to be sustained, yet we do not by any means rest the case upon such ground.

There are many reasons why a person would not even embark in the retail business if he understood that the wholesaler from whom he purchased his supplies was also to deal with the retailer's customers, because he would know at once that he was embarking in a losing business. He would know that the wholesaler, having an accurate knowledge of the cost of his own goods, would be in a postion to undersell him and destroy his business.

The relations of retailers and wholesalers are very well stated in

Bohn Mfg. Co. vs. Hollis, 54 *Minn.*, 223.

In that case there was an agreement between retail lumber dealers that they would not buy of wholesale dealers who sold to consumers. Respecting the relations of the retailers with the public and with the wholesalers, the court said:

> "It is conceded that retail lumber yards in the various cities, towns and villages are not only a public convenience but a public necessity; also that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now, when reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form an association to protect themselves from sales by wholesale dealers or manufacturers directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all

their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendant's offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion or intimidation, either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff for 10 per cent on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of non-dealers at the same points, it would probably conclude to pay; otherwise not. It cannot be claimed that the act of making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff or not as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be 'expelled,' but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred—to trade with the plaintiff or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law."

From the time when wholesale business became necessary, it was well understood to be a business separate and distinct from retail business. The rule has been and it was always understood that wholesalers should deal only with the retailer, and that it was bad faith for the wholesaler to deal with the customers of the retailers, so much so that such dealing was usually done in secret.

In the very nature of things, it could not be otherwise. The relations between the wholesaler and his customer were in a large measure confidential. He had a con-

fidential knowledge of his customer's business. This is why there is always between the wholesaler and his retail customer a tacit understanding that the former will not sell to the customers of the latter, an understanding, by the way, which is now criminal under the Mississippi statute as construed by the court of that state.

As said by the Minnesota court, in Bohn Mfg. Co. case, the retail dealer is a public necessity. The part taken by him in the world's trade is necessary to its convenience. He is the necessary distributer to the consumer. The reason is obvious. The retail dealer is a part of the community in which he lives and does business. He knows and is known by his neighbors. His reputation, whatever it may be, is established in the community. It is known whether he is trustworthy or otherwise. The people know what they are doing when they trade with him because they can see the goods they are buying and make their choice from observation of the goods. The destruction of that retailer's business always means ultimately an injury to the community.

The answer to the Bill of Complaint shows that such a result must follow if the retailers undertake to compete with the wholesaler who sells to them. It follows that any lawful act of self-preservation which benefits them is not inimical to the communities in which they live.

Now and then it is true that a concern advertises itself as a wholesale and retail dealer. But the phrase "wholesale dealer" as used in the Declaration of Purpose shown here does not reach or cover such a case. Nor is such a concern objectionable because the business is openly advertised and does little or no harm to the retailer. It is not necessary to have an organization to inform retailers in such cases, but is necessary where wholesalers deal in secret.

Competition when applied to business has always been understood as a struggle between persons engaged in the same line of business. There is no such thing as competition between a hardware and a dry goods merchant, nor between a grocer and a trunk and leather dealer, nor between any two distinct callings. In trade the distinction between a wholesale and retail trade is just as sharp and clear as between any other two trades and perhaps more so because the wholesaler has obtained his customers upon the assumption that he will not engage

in their trade or calling. The fact that he does is not competition as generally understood, it is not the kind of free competition which the law encourages and protects.

We feel that we have been prolix in trying to illustrate the character of the agreement and have failed to give much aid. In fact the agreement explains itself as well and perhaps better than any illustration that we have been able to make. It shows clearly enough the conditions under which the agreement is made and that it is a legitimate agreement or combination to promote the lawful interests of the retailers as well as a defensive measure.

But, while the situation very properly calls for a defensive measure, it is not necessary to justify it on that account. It is an association which the retailers had a right to make in their efforts to better the conditions of their trade whether trying to meet unfair action by others or not. If it affected competition at all, it does so indirectly and remotely. It seems to us that the Supreme Court of Mississippi has so construed the statute as to make it cover all kinds of business agreements. Whether it was so intended by the legislature of Mississippi we need not discuss as we are bound to take the construction given to it by the courts of that state. That construction, we insist, renders the statute unreasonable and oppressive.

Doubtless it will be argued that the fact that wholesalers are in position to undersell retailers, the consumer, otherwise the public, thus gets the advantage of the wholesale price when wholesalers sell direct to them, therefore any combination which even tends to restrain such sales is inimical to the public.

Laying aside the question of whether such a combination would in any event be unlawful, it is to be observed that the same argument might be made in favor of a combination which by reason of its great resources undersells the small dealer and thus puts him out of business. The public in either case would get a temporary advantage, but it would be of the character described by this court in the case of

United States vs. Trans-Missouri Freight Assn., 166, *U. S.*, 290.

We quote from page 322:

> "It is true the result of trusts or combinations of that nature may be different in different kinds of corporations and yet they all have an essential similarity and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently reduce the price of the article traded in or manufactured by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may, nevertheless, be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all powerful combination of capital.

It would seem that the State of Mississippi has overlooked the circumstance that sales by wholesalers to consumers are in fact not only a restraint upon the trade of retailers, but mean its ultimate destruction, and this too by the same means that are often resorted to by large combinations of capital.

The Declaration of Purpose of the Retailers' Association concedes that the wholesale dealers have the power to control retail prices by pursuing in bad faith a policy of underselling the retailers. The same power to destroy is often the purpose of great combinations of capital.

> "It is the power to control prices which makes the inducement of combination. It is such power that makes it the concern of law to prohibit or limit them."
>
> *National Cotton Oil Co. vs. Texas*, 197 *U. S.*, 129.

The power of the wholesalers over the retail trade, although lawfully acquired and existing, is in its effect the same as though it had been acquired by unlawful means. Can it be said that the retailers may not agree not to purchase of those who exercise this power?

Liberty of contract necessarily includes the right of men to associate in the conduct of their business. They may unite their capital, their skill and their acts. We need not cite authorities to show that this is a right guaranteed by the ~~Fifteenth~~ Fifth and Fourteenth Amendments.

It should be said that the natural liberty of the citizen must be exercised with due regard to the same rights of others. This modification of what may be called natural rights may be said in a sense to give rise to the governmental power of police regulations. Without attempting to define what police power is, it is probably safe to say that it is the power to make rules or regulations governing individual conduct for the general good. In the exercise of this power some individual rights and liberties must give way to a greater or less extent, but no further than is necessary to preserve an equality of rights between all, and the exercise of police power must always have due regard to freedom of contract as well as of personal liberty.

In the case of United States vs. Trans-Missouri Freight Association, the question of the constitutionality of the Sherman Act was not presented, but in the case of United States vs. Joint Traffic Assn., 171 U. S., 505, which followed it, was. Various arguments and illustrations were presented to this court attempting to show that the scope of the Sherman Act was such as to forbid all contracts which indirectly affected trade or commerce. This court did not accept that construction. If it had, we shall assume that it would have held the Act to be unconstitutional, although it declined to go into the question of the extent of the legislative power in this direction. After stating the examples of the kinds of contracts which counsel in that case suggested were rendered illegal by the Sherman Act, this court said at page 566:

> "This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. * * * The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In Hopkins vs. United States (Post 290), decided at this term, we have said that the statute applies only to those

contracts whose direct and immediate effect is *a restraint upon interstate commerce,* and that to treat the act as condemning all agreements under which as a result the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting a legitimate business of an individual or corporation with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not as we think covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, one not called for or justified by the decision mentioned or any other decision of this court."

If we correctly understand this language, we assume that the Mississippi statute would not have received from this court the construction put upon it by the court of that state, and therefore the statute thus construed is unreasonable if the agreement we are considering does not directly restrain trade or hinder competition.

The Mississippi act itself, like all other state statutes directed against trusts and monopolies, is in terms substantially like the Sherman Act in its effect, so far as it relates to restriction of trade and hinderance of competition. It has some drastic features which are not contained in the Sherman Act and to which we shall presently refer. But reading into the Mississippi statute the construction which the court has put upon it makes it, as we understand it, widely different from the Sherman Act as construed by this court.

This brings us to the question whether the police power of the state may go to the extent contemplated in the Mississippi statute as construed. We submit that it cannot.

We think that the principle which has been applied to labor organizations is applicable and should be applicable to this case. Rules of law governing human action should be applied without distinction of class. We think it is universally held that a labor union established for the promotion of the interests of its members in a reasonable way is a justifiable and commendable organization. All that laborers have to sell is their labor, and we know of no case holding that laborers may not combine against their common employer to obtain higher wages or shorter hours of labor, so long as they do not resort to acts of coercion or acts similar in character. This doctrine is very well set out in

Reynolds vs. Davis, 198 *Mass.*, 294,

the remarks being at page 302, as follows:

> "It is held universally in law, and is conceded generally in public opinion, that a labor union established for the promotion of the interests of its members in a reasonable way is a justifiable and commendable organization.
>
> "It is right that all the members of such a union should unite for the promotion of the interests of every individual member. If the feeblest of its members has a just grievance as an employe against their common employer, it is proper that the whole combination should act together to obtain redress of the wrong. The most effectual way of enforcing the right of every member to just treatment from his employer in reference to wages, hours of labor and other things affecting his interests is by withholding the labor of the union until justice is done. To make this a potent inducement the union must be able to act as one body and to hold every member to the performance of his duties to his fellow members so that all may be a united force."

While the foregoing is contained in a dissenting opinion, it was subsequently quoted in the prevailing opinion in the case of

Wilcutt & Sons Co. vs. Driscoll, 200 *Mass.,* 110.

In the latter case, a question of unlawful interference arose with reference to a labor strike. This was a bill filed to enjoin some 1,800 members of certain labor unions from combining and conspiring by threats or intimidation to prevent any person from entering the employ of the plaintiff or remaining therein, and particularly by the imposition of fines and penalties upon members of those unions who desired to work for the plaintiff.

In this case, it was held that the suit could be maintained by an employer against the members of a labor union who were engaged in a lawful strike for higher wages and shorter hours, from causing his day laborers who were members of the union to leave his employ by threatening to impose fines under a by-law of the union.

The right of the defendants to combine for higher wages was conceded by the opinion. The invalidity of their action consisted in imposing fines which amounted to coercion and therefore illegal.

> "The defendants also have rights, they have the right to work or not to work, and sell their labor upon such terms as they see fit, and to combine for the purpose of getting more pay for a shorter day. And for the purpose of strengthening their organization and making it more effective, they have the right to make appropriate by-laws for its internal management and for the regulation of the conduct of its members toward each other, and in matters affecting the general interest of the body, and they may enforce obedience to such by-laws and regulations by fines or other suitable penalty . * * * So long, also, as the by-laws of the union relate to matters in which no one is interested except the association and its members, and violate no right of a third party, or no rule of public policy, they are valid. Fines may be imposed, for instance, for tardiness, absence, failure to pay dues, or for misconduct affecting the organization or any of its members, and for numerous other acts. It cannot be successfully contended, however, that as against the right of some party other than the association and its members an act otherwise a violation of the third party's rights is any less a violation because done by some member in obedience to a by-law. * * * So a by-law providing that, upon an order to strike, every employe shall quit working, even

> although such an act should be in violation of a contract then existing between him and his employer for continuous service, and that for failure thus to break his contract the membership shall be fined, doubtless would be declared invalid. And the principle at the bottom of such a decision is this, namely: An interference with the right of a third party cannot be justified upon the ground that the intruder is acting in accordance with an agreement between him and some other person."

The case of

> *Heim vs. N. Y. Stock Exchange*, 118 *N. Y. Supp.* 591,

applies to this case with a remarkable closeness and we may be pardoned for calling atention to it at some length.

The New York Exchange is a voluntary association limited to 1100 members, furnishing facilities for the transaction of the business of buying and selling stocks and bonds on commission. On May 19, 1909, a resolution was adopted as follows:

> "Resolved that any member of this Exchange who transacts any business directly or indirectly with or for any member of the Consolidated Stock Exchange who is engaged in business upon said Consolidated Stock Exchange shall on conviction thereof be deemed to have committed an act or acts detrimental to the welfare of this Exchange."

Section 6 of Article 17 of the Constitution reads:

> "A member who shall have been adjudged by a majority of votes of all the existing members of the governing committee guilty of wilful violation of the constitution of the Exchange, or of any resolution of the governing committee regulating the conduct of business of members, or of any conduct or proceeding inconsistent with just and equitable principles of trade, may be suspended or expelled as the said committee may determine, unless some other penalty is expressly provided for such offense."

From this section it will be seen that a member of the Stock Exchange who transacts any business with an active member of the Consolidated Exchange is liable to suspension or expulsion. The plaintiff was an active member of the Consolidated Exchange, also tran-

sacting business with a firm of brokers who were a Stock Exchange house, and through whom he bought and sold stocks and bonds upon the floor of the Stock Exchange. On May 21, 1909, the firm of brokers notified the plaintiff that, because of the resolution above quoted, he must withdraw his account and that thereafter they could transact no further business with him. It is alleged, and not denied, that, by reason of the constitution and resolution, all members of the Stock Exchange will refuse to buy or sell stocks and bonds for the plaintiff or any other active member of the Consolidated Exchange. It seems to have been conceded that the two Exchanges were rivals in business.

The plaintiff sought to enjoin the Stock Exchange from enforcing the above resolution of non-intercourse and to prevent the firm of brokers from ejecting his account upon the reasons stated by them.

In the course of its opinion, the court said:

> "Is this resolution void as being an illegal combination in restraint of trade, and may its enforcement be restrained at the suit of the plaintiff? Any one of the members could refuse to do business with the plaintiff and no law would interfere. All of the members individually could refuse to buy or sell for the plaintiff and it would simply be a business misfortune. The question is, can the members unite and agree not to do business with the plaintiff while he is a member of a rival association?
>
> "It would be illegal for them to agree not to transact any business with him, all for no other reason than that they did not like him or his business, and it would be illegal for them to combine not to buy or sell for him while he was a member of any particular club, church or political organization, for this would be a clear interference with his liberty and a direct attack upon it, but can they base their non-intercourse resolve upon the ground that the plaintiff belongs to and is actually engaged in building up and strengthening a rival to their detriment? I think they can. The distinction which the decided cases make is this, if the combination not to do business with the plaintiff is for the purpose of injuring and destroying him, it is illegal, but, if injury to him follows as an incident from actions

sought to protect, increase and strengthen the business of the associates, then it is as legitimate as other forms of competition which the law leaves parties and combinations free to indulge in. The plaintiff is not driven out of the stock and bond business, he simply cannot enjoy one privilege *openly* and the other *secretly*. He can buy and sell freely of the Stock Exchange members upon ceasing active work for its rival, or he can confine his activities to the Consolidated Exchange of which he is a member.

"The only condition which the above resolution of the Stock Exchange places upon him is that he shall not continue indirectly to injure their business. It is a case of give and take. It cannot be said, in view of the history of the two exchanges, that this resolution has been passed through any bad motives or for the purpose of injuring the plaintiff."

In

Doremus vs. Hennessy, 176 *Ill.* 615,

it is said:

"Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable, nor would competition of one set of men against another set carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice."

It seems needless to multiply citations.

There seem to be two lines of decisions relative to such combinations as the one under consideration. One holds substantially that voluntary combinations refusing to do business with outsiders are not even prima facie tortious. The other is that, although such combinations may be prima facie tortious, they may frequently be justified by a proper motive. A third line of cases is to the effect that, where the object is solely to injure another, it is illegal. This latter doctrine is sustained by the ruling of this court in

Aikens vs. Wisconsin, 195 *U. S.* 194.

We submit that these decisions, as well as many others, demonstrate that the plaintiffs in error in making the

agreement under consideration were exercising a right of contract guaranteed by the 14th amendment to the Federal Constitution which no state by legislation or judicial decision can take away.

In considering this case, we must take the agreement we have with all its conditions, not some other which may have different conditions. It does not help to solve the question before us by supposing what some other combination, having a different object and purpose, surrounded by different conditions, may intend or could do. We must determine the conditions, the purpose and effect of this agreement or combination. We submit that its purpose was lawful, that it is not harmful to the public, nor is its direct or necessary effect to restrain trade or hinder competition; therefore it is not inimical to the public welfare whatever the legislature of Mississippi may say about it. The Mississippi court did not investigate the question but simply determined that the agreement is inimical to the public welfare solely because it holds that the statute so declares it.

We are aware that the matter of determining the extent of the police power of a state is always a delicate question, but we are also aware that the 14th amendment to the Federal Constitution was adopted for the express purpose of protecting the citizen of a state when it is sought to deprive him of them. This is the reason we invoke its protection.

In writing this brief, we are unfortunately without a complete copy of the Mississippi statute before us, but we have enough to warrant us in urging that the penalties for which it provides are so excessive as to render the statute unconstitutional on this ground alone. The minimum penalty for a violation of the statute is two hundred dollars for each offense, the maximum is five thousand dollars, and each day constitutes a separate offense. It should be so that any person who feels that he is deprived of his individual liberty by the provisions of a statute limiting his right to make contracts can safely test out his legal rights in the courts without being imprisoned or financially ruined. Inasmuch as this test cannot ordinarily be done in less than two years, the statute means an accumulation of fines to the minimum amount of $120,000, or a maximum amount of $3,000,000. Whether the transactions and proceedings which have taken place in the State of Mississippi since the trial of this cause are properly before this court we are unable to say. If it be a fact properly before this

court that, since this case was appealed to this court, proceedings have been taken to collect a vast sum in fines from these defendants, and that a number of the appellants in the face of impending ruin have been induced to withdraw their appeal here on the payment of a small fine, we should not feel called upon to offer anything further on the subject. But, whatever may be before this court, it is perfectly apparent that such things may happen under this statute. It seems to us that no legislation should be permitted to stand which allows such a result in its wake.

It will be noted that Section 5004 provides for a recovery of the penalty prescribed by civil suit, and also directs that the circuit judges shall call the attention of the grand juries to the provision. We are informed that Section 5012 also provides for criminal transactions. If so, it would seem that, taking the two sections together, a punishment is provided for in double the amount of the fine imposed by Section 5004. It is doubtless competent for the legislature to provide for criminal prosecutions and civil suits for the one offense, but not with such enormous penalties as to deter men from resorting to the courts to determine their rights. We are also informed that Section 5016 provides that civil or criminal prosecution by the district attorneys shall not abridge or impair the power of the attorney general. After the expressions used by this court in Cotting vs. Goddard, before cited, and in

Ex Parte vs. Young, 209 *U. S.* 123,

it would be useless for us to add anything, and, if the question can properly be raised, there would seem to be no doubt but that the statute should go down. If the fines and penalties imposed may be said to deter those charged with violating the statute from appealing to the courts for protection, the statute certainly denies them the equal protection of the laws. If so, the assignment of error brings the point before this court.

The Supreme Court of Mississippi said that citizens must look to the law for their protection and not take it into their own hands. This is an axiom, but it has no legitimate place in this discussion. A statute at variance with the Federal Constitution is not a law. What the Mississippi court intended to say and did say was that the people must look to their legislature for protection instead of to those greater and broader principles of law governing human relations established even before

any of our constitutions. This is equivalent to saying to the people of the State of Mississippi that they have no right to appeal to the courts, and is a denial of the equal protection of the laws.

C. D. JOSLYN,

Of Counsel for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1909.

Number 493.

GRENADA LUMBER COMPANY, et als., Plaintiffs in Error,

v.

STATE OF MISSISSIPPI, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

In March, 1906, some seventy, or more, retail lumber dealers of the states of Mississippi and Louisiana organized themselves into an association called the Retail Lumber Dealers of Mississippi and Louisiana, succeeding a former organization of like character, which had been in existence previously, but which the Attorney General of the State of Mississippi was then about to attack in the Courts for violation of the laws of Mississippi against trusts and combines.

Certain articles contained in the constitution before that time, were amended with the object of continuing the organization but avoiding the inhibitions of the anti-trust laws, by these amendments to the constitution.

The association, consisting of said seventy lumber dealers, corporate and individual, continued to operate as under the old organization, and it is alleged in the bill, and not denied, that the organization so continued to operate until the bill in this case was filed, in 1907.

It is the contention of the state that the constitution of said association, made a part of this record, and under which it operated, and which constituted the contract and agreement between said members of said association, was violative of the laws of

Mississippi against trusts and combines; and the decision of the Supreme Court of Mississippi to that effect, which decision is a part of the record in this case, should be affirmed.

The avowed purpose of said organization was to refrain from doing business with, and to withdraw their business from, all manufacturers and wholesalers in lumber who would, or might, sell to consumers in territory where there were retailers, members of said association; and each and every member of said association bound himself or itself, to withhold his, or its, business from said manufacturers, wholesalers, lumber commission merchants, agents, or brokers, who sold to consumers, but did not carry stocks, and from a manufacturer who might sell to such commission merchants, agents, or brokers.

It is urgently insisted, by the able counsel for plaintiffs in error, that it was not the intention of the members of said association, in organizing and becoming members of said association, to restrain trade or to hinder competition in the sale or purchase of the commodity, both of which purposes would be illegal, under the laws of the State of Mississippi.

The agreement, entered into between the several members of said association, and denominated its constitution, is before the Court, and the purposes of the association must be gathered from that instrument.

It is plainly apparent that the purpose of said organization was to prevent all competition between the wholesalers and the retailers in selling to consumers of lumber; and it was the further purpose of said association to prevent all competition by withdrawing their patronage from manufacturers who sold to lumber commission merchants, agents, brokers, and who did not, themselves, carry stocks of lumber.

The effort is made to avoid the apparent object of this organization by the assertion that it was for the purpose of preventing the destruction of the retailer, and the ultimate effect of the agreement would be to increase competition for the consumers, commission merchants, agents, and brokers, by keeping the retailers in business and not allowing the wholesalers to come in and absorb the business, and thus eliminate the retailer; that the retailer could not stand such competition for the reason that the wholesaler is familiar with the methods of business of the retail dealer, prices he has paid for lumber, profits he

would have to make to continue in business, size of his stock, kind and quality thereof, etc.

It is difficult to understand the necessity for the organizaton upon this theory, or to reach this conclusion, logically, when the allegations of the answer are taken in connection with the constitution filed in this cause. The defendants allege, in this answer (page 17, paragraph 4, of the record), "There are approximately 2,400 wholesalers and manufacturers of lumber, and lumber products, as defendants are informed and believe", in Mississippi and Louisiana, and among these are many more than enough to supply the defendants with lumber and lumber products, who make it a rule, of their own volition, never to deal with consumers.

It is apparent from this that much of the argument along the line that the organization is necessary for the protection of the retailer, is not supported by these statements, for the retail lumber dealers were not subjected to any competition by these wholesalers, and the retailers were in no danger from these wholesalers, who could have supplied their wants, and did not deal with consumers direct, and would not have taken advantage of their trade secrets.

It is the interest of the general public with which the legislatures of the states are concerned, and which instigated them to pass the various laws against trusts and combines, and the law of Mississippi requires the Courts to liberally construe these laws so "That trusts and combines may be suppressed, and the benefits arising from competition in business preserve to the people of this State":

> Act of the Mississippi Legislature of 1900; Chapter 88, page 125, Section 11; Code of Mississippi of 1906, Section 5021.

If the retailer cannot freely compete with the wholesaler, it is his misfortune, and he cannot be allowed, in order to protect himself, to enter into a combination which will defeat competition for the consumer. If the wholesaler becomes a retailer, it may result in the destruction of some other retailer, but it is incomprehensible that the general public should be injured thereby.

It is the theory of the plaintiffs in error that a mere "Let alone" policy would not be a violation of law, and the state does not contend that it would be a violation if indulged in independ-

ently by each retailer without concerted action with other retailers; but it is a violation of law to combine, for the purpose of depriving the wholesalers of the State, of a large percentage of their business, unless they will conduct their business in accordance with the wishes of the retailers, and allow them thus to dictate to whom sales of lumber shall be made:

Loewe v. Lawlor, 208 U. S. Rep., 488;
Bucks Stove & Range Company, recently decided.

I do not intend to burden the Court with a long discussion of the facts in this case, as disclosed by the answer and the constitution, as these facts, and the objects of the association, as declared by the constitution, have been held by the Supreme Court of Mississippi, to be a trust and combine under the laws of the State of Mississippi, and that finding is conclusive, under the decisions of this Court, unless the statutes of Mississippi, controlling in this cause, are violative of the 14th amendment to the Constitution of the United States.

The provisions of the Act of the Legislature of Mississippi of 1900, (page 125, **supra**), and amendments thereto, and the Code of Mississippi of 1906, Section 5002, under which this organization was declared to be a trust and combine, are not violative of the 14th amendment to the Constitution of the United States, as construed by the Courts of Mississippi.

Section 1, of the Act of the Legislature of Mississippi of 1900, Chapter 88, page 125, is as follows:

"That a trust and combine is a combination, contract, understanding or agreement, express or implied, between two or more persons, corporations, or firms or associations of persons, or between one or more of either with one or more of the others:

(a) In the restraint of trade or commerce;
(b) To limit, increase or reduce the price of a commodity;
(c) To limit, increase or reduce the production or output of a commodity;
(d) Intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;
(e) To engross or forestall a commodity;
(f) To issue, own, or hold certificates of stock of any trust or combine;

(g) To place the control, to any extent, of business or of the products and earnings thereof, in the power of trustees, by whatever name called;

(h) By which any other person than themselves, their proper officers, agents and employes shall, or shall have the power to, dictate or control the management of business; or

(i) To unite or pool interests in the importation, manufacture, production, transportation, or price of a commodity;

And inimical to the public welfare, unlawful, and a criminal conspiracy."

The association complained of was organized in March, 1906, and continued to operate, at least, until the bill was filed in this cause, in 1907. The Code of Mississippi of 1906, went into effect the first day of October, 1906, and the sections and sub-sections involved in this cause are, as follows:

"Sec. 5002. Definition of terms: criminal conspiracy.— A trust and combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others:

(a) In restrant of trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) Intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own, or hold the certificates of stock of any trust or combine;

(g) To place the control, to any extent, of business, or of the products and earnings thereof, in the power of trustees, by whatever name called;

(h) By which any other person than themselves, their proper officers, agents, and employes shall, or shall have the power to, dictate or control the management of business; or

(i) To unite or pool interests in the importation, manufacture, production, transportation, or price of a commodity; and is inimical to the public welfare, unlawful and a criminal conspiracy.

Any corporation organized under the laws of this or any other state, or country, and transacting or conducting any kind of business in this state, or any partnership or individual, or other association of persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or

a party to, any pool, trust, combine, agreement, combination, confederation, or understanding, whether the same is made in this state or elsewhere, with any other corporation, partnership, individual, or with any other person, or association of persons, to regulate or fix in this state the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or tornado, or to maintain said price when so regulated or fixed, or who are now, or who shall hereafter enter into, become a member of, or a party to, any pool, agreement, contract, combination, association, or confederation, whether made in this state or elsewhere, to fix or limit in this state the amount or quantity of any article of manufacture, mechanism, merchandize, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premiums to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this chapter.

Any corporation, domestic or foreign, which shall restrain, or attempt to restrain, the freedom of trade or production; or which shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management, or control of any kind, class, or description of business; or which shall engross or forestall, or attempt to engross or forestall, any commodity; or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity, by offering the same for sale at a price below the normal cost of production, shall be deemed and held a trust and combine within the meaning and purpose of this chapter, shall be liable to all the pains, penalties, fines, forfeitures, judgments and recoveries herein denounced against trusts and combines, and shall be proceeded against in manner and form provided in this chapter in case of other trusts and combines."

Plaintiffs in error discuss a number of cases decided by the Supreme Court of Mississippi, construing these statutes, endeavoring to show that these decisions are confusing and in conflict, and in support of this position quote numerous statements of the Court made in discussing the different cases, which, if not considered along with the facts in each particular case, will make it appear that the decisions are confusing and in conflict.

Of course, these decisions are worth nothing as precedents and throw no light upon this cause unless they are taken in connection, and considered along with, the facts in each particular case; and, when so considered it will be found that the causes were properly decided, and are in no way in conflict.

It may be admitted that the Supreme Court of Mississippi has held in some cases that the intent is immaterial; in other cases that the intent will be considered in determining the legality, or illegality, of the contract, but the effect upon the general public is immaterial; and in other cases that the contract will be illegal if the purposes and objects of the agreement are to restrain trade and hinder competition, even though the methods adopted may not be effective; and, yet, these decisions are not in conflict when considered with the facts in each particular case.

Certainly, no Court will support a contract, made with the purpose and intent clearly expressed, or discovered by the court, of restraining trade and hindering competition, even if it was made to appear that the avowed and apparent object had, or would, fail of accomplishment by reason of the ineffective methods adopted, the failure of the conspirators to adhere to the agreement, or from other causes.

So, a contract which appears to have been made with the utmost good faith, if it becomes apparent to the Court will, if carried out, result in restraining trade and hindering competition and injuring the public, will be declared illegal, not withstanding the innocence of the parties in entering into the combination. So, a contract entered into with the purpose and intent of restraining trade and hindering competition, will be declared illegal if the tendency thereof is to injure the public, even though the contract may not be effective.

Hammond Packing Company v. Arkansas, 212 U. S. Rep., 322; 53 Law Ed., 530;

Waters-Pierce Oil Co. v. Texas, 212 U. S. Rep., 86, 53 Law Ed., 417;

State, ex rel., Hadley, Att'y. General, v. Standard Oil Company, 116 S. W., 902;

Standard Oil Co. of New Jersey v. United States, recently decided at St. Paul by the United States Circuit Court for the Eastern District of Missouri.

The Bohn case (21 L. R. A., 337) is relied upon as sustaining the legality of the combination attacked. It must be admitted that Bohn's case sustains the contention of the plaintiffs in error, but it is based upon an erroneous conception of the law and is worthless as a precedent in the instant case. The decision is bottomed upon the theory expressed by the court that "What one man may lawfully do singly, two, or more, may lawfully do jointly. The number who unite to do this act cannot change its character from lawful to unlawful."

This reasoning is unsound, and is not adhered to in subsequent cases, by the Supreme Court of Minnesota, that decided the Bohn case.

Of course, the tendency of the Supreme Court of Minnesota would naturally be to follow the Bohn case, a case decided by that Court, but in **Ertz v. Produce Exchange,** 79 Minnesota, 140, the Court held that a conspiracy in restraint of trade would be illegal when entered into to injure others; thus distinguishing that case from a case where the contract, agreement, or understanding is entered into for the purpose of promoting legitimate enterprises, but wherein trade is only incidentally restrained.

Of course, the Minnesota Court would be slow to reverse its earlier ruling, but it limits the ruling in the Bohn case, to a case where it clearly appears that the combination was entered into solely for the purpose of protecting a legitimate enterprise, and not to injure another.

The Supreme Court of Minnesota in the case of **Gray v. Building Trades Council,** 91 Minnesota, 171, said: "It appears (referring to the Bohn case), that the plaintiff therein had sold certain material to contractors, and the defendants threatened to inform all the members of the retail association of the fact, and plaintiff brought that action to restrain them from so doing, on the ground that it was a conspiracy to injure his business. The Court held otherwise, but the decision is put on the ground that the action of the retailer dealers was, in effect, a strike, and not restrainable in equity." It thus appears that the Supreme Court of Minnesota all but reversed the Bohn case in the case of **Gray v. Building Trades Council**; and in order to avoid a reversal accounted for the decision in the Bohn case on the theory that it was decided upon the question of jurisdiction.

As sustaining the opposite view of the Bohn case, the case of **Jackson v. Stanfield,** 23 L. R. A., 588, may be read with interest. This is a case upon allfours with the case at bar except that the wholesalers were honorary members of the retail dealers association, and the wholesaler by suffering certain penalties, to-wit, the payment of commissions, might escape the severer penalty of loss of business.

The fact that only members of the association were affected by the agreement was presented to the Court as an argument to show that the association was legal, but the Court replied: "The rules of the association do not affect alone members active and honorary. They extend to and reach, any wholesale dealer in the United States with whom the threat of 150 retailers can have weight."

It thus appears that the Court in the Jackson case considered this proposition, and based its decision, among other grounds, upon the fact that parties not members of the association would be terrorized into complying with the association's inhibitions against the sale of lumber, on account of the danger of loss of business:

McClelland v. Anderson, 5 L. R. A., 136;
Moore v. Bennett, 15 L. R. A., 361;
Lovejoy v. Michels, 13 L. R. A., 770;
Buffalo Lubricating Oil Co. v. Standard Oil Company, 12 N. E., 825;
Dtz v. Winfried, 26 Am. St. Rep., 755;
United States v. Jello Coal & Coke Co., 12 R. L. A., 753.

In the case of **Brown v. Jacobs Pharmacy Company,** 57 L. R. A., 547, the Supreme Court of Georgia intimated, on page 557, that both the Bohn and McCanley cases should be reversed.

Brown, et al. v. Jacobs Pharmacy Co., 57 L. R. A., 547;
Bailey v. Master Plumbers Association, Vol. 1, Eddy on Combinations, section 560 (note on page 476);
Anderson v. Jett, 6 R. L. A., 390.

It is not necessary for me to discuss the constitutionality of Section 5004 of the Code of Mississippi of 1906, referred to in the brief of plaintiffs in error, which is a section of said Code imposing penalties, for penalties have not been imposed in this

case, and even if this section is unconstitutional the cause will not be reversed upon that ground.

For the same reason I avoid a discussion of Section 5007, also referred to in the brief of counsel for plaintiffs in error, that section giving the right of action for damages to private individuals injured by parties to any illegal combination.

It is a doctrine too well established in this Court, to need discussing that if one part of the statute is constitutional it will be sustained, notwithstanding other and independent sections of the same statute may be unconstitutional.

The record in this cause containing no reference to penalty suits, I do not conceive that a discussion of this section by me is appropriate.

It will be seen that the only section involved in this litigation is Section 5002 of the Code of Mississippi of 1906, and the Act of 1900, above referred to, which is similar; and the controversy may be still further narrowed for the reason that only two clauses of the enactments are referred to, i. e., those prohibiting contracts in restraint of trade, and combinations entered into for the purpose of hindering competition in the purchase and sale of a commodity.

As these two clauses are separable from all the other sections and clauses of the laws of Mississippi relative to trusts and combines, and not dependent upon any other clause or section, all other parts of the anti-trust statutes might be unconstitutional, and still these be enforced.

Now, as to the first and fourth clauses of Section 5002: The first clause, sub-section "a", prohibits combinations "In restraint of trade." It is urged that this clause is unconstitutional because it prohibits all contracts, whether reasonable or unreasonable, or inimical to public welfare, and thus encroaches upon the rights of citizens to make contracts under the 14th amendment to the Constitution of the United States.

In the case of **Yazoo & Mississippi Valley Railroad Company v. Searles,** 85 Mississippi, 528, it will be seen that the Supreme Court held that unless such contracts were unreasonable and inimical to public welfare, they were not illegal, and the law had no application to combinations, contracts, or agreements for the promotion of legitimate business enterprises where the freedom of trade might be only incidentally affected. Thus it will be

seen that the Supreme Court of Mississippi has given to this clause a reasonable construction; but it is not necessary to allege and prove that the contract is unreasonable and inimical to public welfare if it tends in that direction and will probably injuriously affect the public. At common law, all contracts in restraint of trade were illegal; so our statute says all contracts in restraint of trade are illegal, but the courts in construing these statutes as they did at common law, will determine what contracts are reasonable, what contracts are unreasonable, what contracts are inimical to public welfare or not inimical to public welfare, what contracts were made with the intent of restraining trade, and what contracts have a tendency to restrain trade; and those contracts that are found to unreasonably restrain trade, those entered into with the intent of restraining trade to an unreasonable extent, and those having a tendency to restrain trade to an unreasonable extent, will be declared illegal.

24 Am. & Eng. Encl. Law (2nd Ed.), 842;
2 Eddy on Combinations, 719.

The contract involved in this cause is prohibited by both clauses "a" of chapter 88 of the Laws of 1900, and paragraph "d", and by the same clauses in the Code of Mississippi of 1906, section 5002; and the decision of the Supreme Court of Mississippi will be supported if either one of these clauses is constitutional, without regard to the legality or illegality of the others.

If the intent is to form a partnership, corporation, or other organization for legitimate business enterprises, and the enterprise is undertaken in good faith, and trade is only incidentally restrained, the business is legal. The contract attacked in the present instance has none of the earmarks of a contract entered into for the legitimate promotion of trade, but is purely for the purpose of restraining competition by the threat, held over the wholesalers, to withdraw all patronage from those wholesalers who sell to consumers direct, and those who have not their own stocks of lumber. There is no other object expressed except the oft-repeated assertion that the combination has no intent to injure anyone. It appears that they do "protest too much." Unquestionably, the contract was entered into for the purpose of hindering competition, and even if not in restraint of trade, certainly, the Courts will not hold a contract, legal, reasonable,

and uninimical to the public welfare, entered into in an effort to and with intent to hinder competition. The contract itself will be looked to, and all the surrounding circumstances, to determine the purposes of its execution.

2 Eddy on Combinations, Section 719.

The Supreme Court of Missouri, in construing a statute of that state, similar to ours, sustained the constitutionality of the statute, although the statute did not provide that those combinations only should be illegal which were unreasonable, and inimical to public welfare. The Court held further that the statute did not take away the constitutional right of the individual to enter freely into contracts for legitimate business purposes, but did make illegal contracts, intended to destroy competition.

I quote from the holding of that Court, as follows: "Said statute is not unconstitutional. It is not true that it 'deprives insurance companies of their life, property, or liberty without due process of law' on the theory that it renders it unlawful for any companies to contract among themselves for the reasonable adjustment and maintenance of insurance rates. It permits any company to contract with any person who desires to insure his property upon any terms that may be agreed upon. It does prohibit insurance companies from agreeing with another insurance company not to contract with any person except upon the terms that the confederated companies have previously fixed. The statute refuses to permit a company to strip itself of the power freely to contract. It guarantees to both insurance companies and the insured unrestricted power to lawfully contract."

A clear exposition of the law as here announced will also be found in the case of **State v. Armour Packing Company**, 173 Mo., 356, particularly pages 379, 380 and 387 and 392.

In the case of **United States v. Addyston Pipe & Steel Co.**, 46 L. R. A., 122, a case decided by the then Judge, now President, Taft, the Court went exhaustively into a discussion of these questions, and said in part: "Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void, as conditions of civilization and public policy have changed; and the argument drawn therefrom is that the law now recognizes that competition may

be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having other purpose, will be upheld. We think this conclusion is unwarranted by the authorities, when all of them are considered. . . . The manifest danger in the administration of justice, according to so shifting, vague, and indetermined a standard, would seem to be a strong reason against adopting it." After considering a number of authorities, he says (page 136, 46 L. R. A., page 290, 85 Fed.): "In the foregoing case the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employe. Where such relations exist between the parties, as already stated, restraints are usually enforceable, if commensurate only with the reasonable protection of the covenantee in respect to the main transaction affected by the contract. But in recent years even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity, if it could be shown that it was only part of a plan to acquire all the property used in a business by one management, with a view to establishing a monopoly. . . . Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they have had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly."

The case of **Bailey v. Masters Plumber Association,** 46 L. R. A., 561, cited by the Supreme Court of Mississippi in its opinion in this cause, is directly in point, the Court saying in part: "It is entirely true . . . . that in the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But, in our

opinion it does not follow from this undoubted freedom of individual member and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them, will make their purchases from only such dealers as will sell to members exclusively. This premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense, and in the oppression of the public. The difference in legal contemplation between individual right and combined action in trade is seen in numerous cases. Any one of the several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.' **India Bagging Association v. Kock,** 14 La. Ann., 164. Any one of the several companies had the right to sell the whole or only a part, of its output, to only such persons, in only such territory, and at only such prices, as it pleased, yet it was inimical to the interest of the public and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose."

20 Am. & Eng. Encl. Law (2nd Ed.), 850.

The case of **Smylie v. Kansas,** 196 U. S. Rep., 447, 49 L. R. A., 546, throws much light upon the controversy in this case. In that case several grain dealers had entered into a combination, understanding or agreement, under which each bound himself not to purchase more than 25% of the grain offered in their local market, under penalty of paying to the others a stipulated amount.

The decision of the Supreme Court of Kansas declaring the combination a conspiracy in restraint of trade, was sustained by the Supreme Court of the United States.

Smylie v. Kansas, 196 U. S. Rep., 447;
National Cotton Oil Co. v. Texas, 197 U. S. Rep., 115;
Waters-Pierce Oil Co. v. Texas, 212 U. S., Rep. 86;
Hammond Packing Co. v. Arkansas, 212 U. S. Rep., 322;

United States v. Joint Traffic [Association; 171 U. S. Rep. 505.

Northern Sureties Company v. U. S., 193 U. S. Rep., 197.

In the Smylie case, **supra**, the proposition insisted upon here, that the statute is too broad, and includes many within its letter, who cannot be legally restrained, and operates oppressively upon many classes, a combination between whom would not be violative of the law, or in restraint of trade, is discussed, the Court saying: "If other transactions are presented, in which there is an absolute freedom of contract beyond the power of the legislature to restrain, which come within the letter of any of the clauses of this statute, the Courts will undoubtedly exclude them from its operation." The Court then quotes with approval the opinion of the Supreme Court of Kansas, as follows: "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law; but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded; hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

The Court declared in that case (page 31 of the Record), that the combination here entered into was unfair, unreasonable, inimical to public welfare, in restraint of trade, and hindered competition; and for these reasons the contract was void; but discussing the case further, the Court said: "We can conceive how 'unfair' competition by the wholesaler with the retailer might, under certain circumstances destroy the retailer, to the ultimate detriment of the public, thus directly stifling competition; however, we have no such case before us, but only the case of a combination intended to destroy all competition by the wholesaler with the retailer, whether fair or unfair. But even if the **former case were here presented,** it is not for the retailer, nor perhaps for this Court even, to undertake to say what is an unfair competition, since the statutes of 1906 make no exception, and no such distinction appeared until the legis-

lature of 1908 so amended the Act of 1906, as to itself define what was unfair competition, and declared a penalty therefor; thus making clear the purpose of the legislature to require all persons to look to the law for protection against unfair competition, rather than to their own efforts and combinations; and to look to the law to define and declare what shall be unfair competition, rather than permit the courts or the parties in interest so to do." And the able counsel for plaintiffs in error seizes upon this quoted expression of the Court to show that the Court intended to declare in this case that the Courts could not be resorted to to determine the legality or illegality of the contract, agreement, or understanding which might be alleged to be violative of law.

Of course, the Court meant by this, that the legislature had declared that all contracts coming within the letter of the statute were prohibited; but, certainly, the Court did not intend to convey the idea that the courts could not be resorted to to determine what contracts are embraced in the expressions used in the statute; and, as stated, **supra,** when the courts are appealed to to determine what contracts fall within the language of the statute, they, will, of course, determine, as they did at common law, that only those contracts are embraced which are entered into with intent to injure the public, tend to injure the public, the probable effect of which may be to injure the public, or which may be declared to be an unreasonable restraint of trade, or to unreasonably suppress competition.

These statutes, as construed, are merely declarative of the common law, and these combinations were illegal at common law, viz., where there is an unreasonable restraint of trade. I assert that this is an unreasonable restraint of trade, and a suppression of competition inimical to the public welfare. But if mistaken in this, the combination comes within the terms of the statute as construed by the decisions of the Supreme Court of Mississippi, and as said in **Smylie v Kansas,** those decisions are controlling. In the cause of **Northern Securities Company v. United States,** 193 U. S., Rep., 197, there was presented to the Court the question as to whether the Congress of the United States had power to restrain combinations, conspiracies, and monopolies upon trade or commerce, or upon such as were unreasonable only. It was held that the Constitution guaranteed

freedom of trade and liberty of contract, but Congress was not prevented from prescribing the rule of free competition between those engaged in interstate and international commerce.

The grant of power of the United States to regulate interstate and international commerce comes from the states themselves, and certainly they would not grant to the United States a power over interstate or international commerce greater than the power reserved for themselves over intra-state trade.

Northern Securities Company v. United States, 47 Law Ed., 331-336.

It will be observed that in the constitution agreed upon by the Retail Lumber Dealers, and the provisions of which they severally agreed to carry out, no penalty is prescribed for the violation of the agreement. This penalty feature, usually found in contracts in restraint of trade, seems to have been purposely eliminated in the hope that the objects of the association might be accomplished and yet the agreement be impervious to legal attack, because of the elimination of any penalty upon the members for violation of the agreement.

The protection which the Courts are expected to extend to the public cannot hang upon such slender threads, and their condemnation of such contracts cannot be so easily avoided. It is the restraint of trade and the suppression of competition that the public complains of and not the penalty and conditions imposed upon the violators of the agreement, as a method of enforcing it between themselves. It is the ultimate result of the combination that the public is interested in, and not the methods of enforcing the contract or agreement in restraint of trade, between the members of the combination.

In the instant case, the articles of agreement seem to have been formed with the idea that if the usual methods of enforcing the agreement between the parties were changed, they would thus avoid the inhibitions of the law upon restraints upon trade and illegal combinations.

It is contended in the brief of plaintiffs in error, that by reason of the fact that wholesalers were not required or allowed to become members of said association, and to subscribe to the provisions of the constitution, the contract is, therefore, not

illegal; that said wholesalers were not bound thereby, and were at liberty to trade with whom they pleased without let or hindrance, pain, or penalty.

It does appear, however, that any wholesaler dealing with the consumer, so dealt with him at the pain and penalty of loss of business with those retailers, composing a large percentage of the retail dealers of Mississippi and Louisiana; and, presumably, the wholesalers would be informed of the withdrawal of business, and all retailers were eligible to membership in the association, so it is reasonable to assume, from a perusal of the constitution, that it was the intent to include all the retailers of the states of Mississippi and Louisiana in the organization, and thus the wholesalers' business, if they dealt with the consumer, would be jeopardized, and probably entirely destroyed. I opine that such a prospect would exert a more potent influence upon the wholesaler than would membership in the association, and the imposition of a mild penalty for disobedience of the agreement not to sell to consumers; and, as said above, it is the effect, or probable result, of the agreement in which the public is interested, and not the devices and methods that the combination may adopt to render effective their nefarious practices.

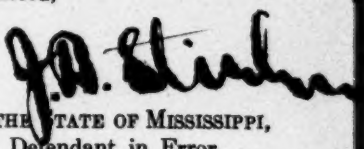
Finally, it is insisted that the enormity of the penalties provided by the Mississippi statute, renders it unconstitutional.

As said, **supra,** the statutes under which this combination was declared illegal, are entirely separable from Section 5004, the penalty statute, and the former may be declared constitutional though the latter may be unconstitutional. Besides, the penalty statute is not invoked in this cause, and, doubtless, the Court will reserve its decision as to its constitutionality or unconstitutionality until a record embracing a suit for penalties is before it.

Suffice it to say, in regard to these penalty suits, it appears by the statement of counsel for plaintiffs in error that the Courts have so far assessed a penalty of only $800.00 each against those who have made no defense in these penalty suits, so that judging the future by the past three is no danger of the Courts oppressing the parties to the combination when enforcing these penalty suits. Had the trusts and combines been as generous in their treatment

of the public as the Courts have been lenient in the imposition of penalties, much recent litigation would have been avoided.

Respectfully submitted,



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